

United States
Circuit Court of Appeals
For the Ninth Circuit. 11

THE FRANZ CORPORATION, a Corporation,
Plaintiff in Error,
vs.
E. J. FIFER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.



United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANZ CORPORATION, a Corporation,
Plaintiff in Error,
vs.
E. J. FIFER,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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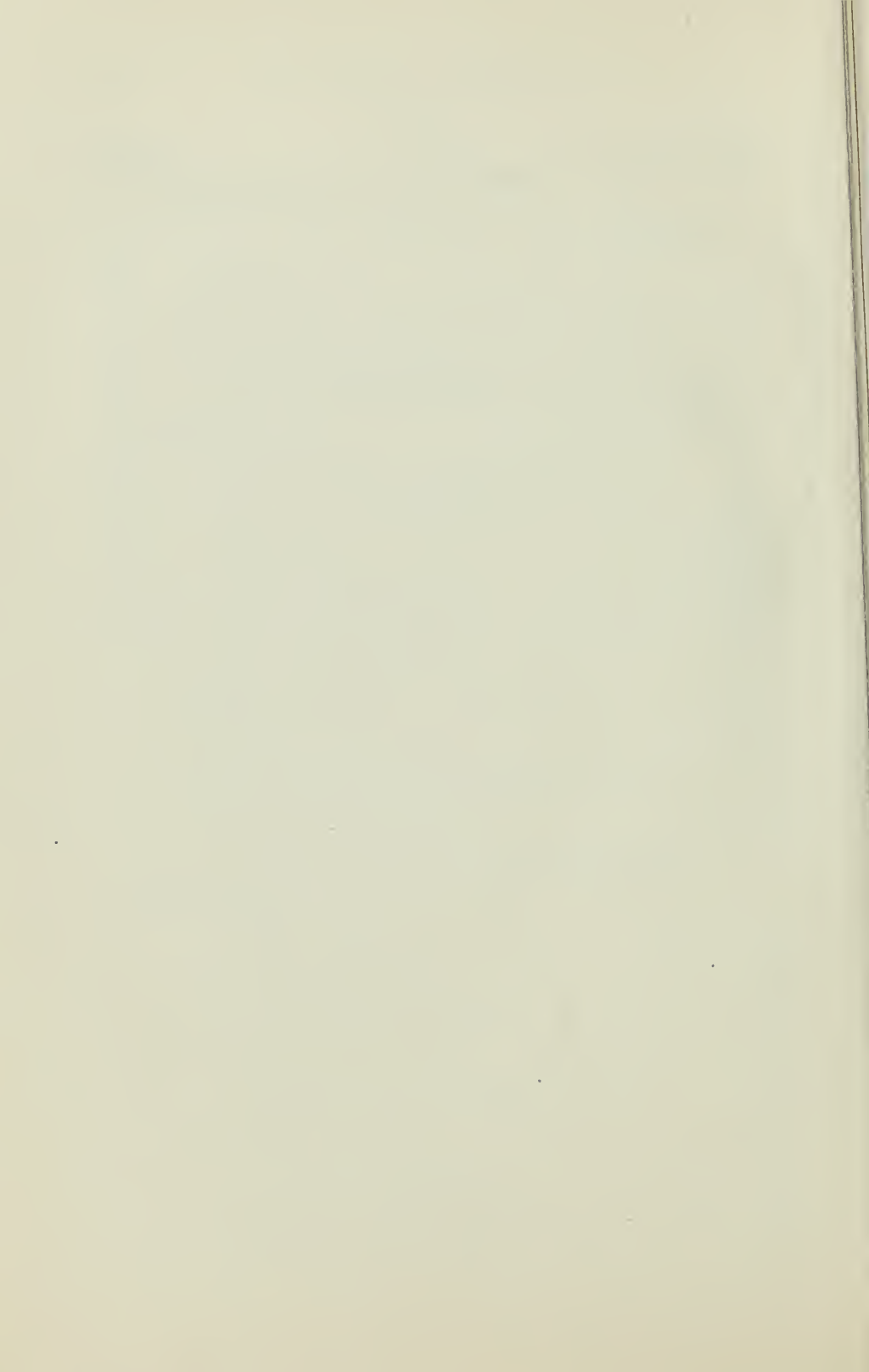
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Names and Addresses of Attorneys of Record.

Messrs. FORD & CHOATE, of
Helena, Montana,
Attorneys for Plaintiff and Defendant in
Error.

Messrs. STEWART & BROWN, of
Helena, Montana, and
CHAS. J. MARSHALL, Esq., of
Lewistown, Montana,
Attorneys for Defendant and Plaintiff in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANZ CORPORATION,

Defendant.

BE IT REMEMBERED, that on June 13, 1922,
the plaintiff's complaint was filed herein, being in
the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Complaint.

Comes now the above-named plaintiff and for cause of action against the above-named defendant, complains and alleges:

1.

That plaintiff is now and was at all the times herein mentioned, a citizen and resident of the State of Montana.

2.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Wyoming, with it's principal place of business in the city of Casper in the State of Wyoming, and that it is and was at all the times herein mentioned, a citizen and resident of the State of Wyoming.

3.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, and is between citizens of different states.

4.

That at all the times herein mentioned, the plaintiff was and now is the owner in fee simple, of

the following-entitled real estate, situate in the State of Montana, to wit:

E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Section 20, Tp. 15 North, Range 30 East, M. P. M. and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Section 21, Tp. 15 North, Range 30 East, M. P. M.

5.

That said land is, and at all the times herein mentioned, was agricultural land, embracing about 50 acres of first-class irrigated land, capable of producing large crops of hay and [3] grain, and 30 acres of dry land under cultivation and capable of producing the crops commonly raised in the State of Montana upon lands of that character and 80 acres of first-class grazing lands.

6.

That on the 26th day of September, 1919, the plaintiff and one Frank Frantz, entered into a certain oil and gas lease, under the terms of which, the said plaintiff granted, demised, leased and let, unto the said Frank Frantz, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe-lines and building of tanks, power stations, and structures thereon, to produce, save and take said products, the lands hereinabove described, a copy of which said oil and gas lease is hereto attached, marked Exhibit "A," and by this reference made a part hereof.

7.

That after the execution of said lease and prior to January 15th, 1920, the said Frank Frantz did sell and assign the said lease to the said defendant, The Frantz Corporation. That under the terms of said

lease, the said lessee, Frank Frantz, agreed to pay to the lessor, the plaintiff herein, the amount of any damages caused to growing crops or fences and any other damages caused to said premises by the said lessee or said lessee's agents, to which said obligation the defendant herein succeeded by virtue of the assignment aforesaid.

8.

That during the month of January, 1920, the said defendant, acting under and by virtue of the provisions of said lease herein set forth as Exhibit "A," entered upon said lands and premises for the purpose of mining and prospecting for oil and gas on said premises. That in carrying on said operations, defendant opened and tore down part of the fences of plaintiff enclosing said lands, established roads over upon and across said lands, built pipelines thereon, constructed telephone lines, built tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon lands other than [4] those of plaintiff, and built a water pumping station upon said lands to supply water for its own operations in the Cat Creek Field, as well as to other persons operating for oil and gas in said field.

9.

That for many years prior to said entry by defendant, plaintiff had been engaged and was so engaged at the time of said entry by defendant, in a successful and profitable general farming and stock raising business upon said premises. That said premises prior to the entry of defendant as afore-

said, were completely fenced with a good and substantial four wire fence properly constructed with posts set twenty feet apart, together with cross fences, lanes and corrals.

10.

That in addition to the operations upon plaintiff's lands as aforesaid for the purpose of prospecting and mining for oil and gas, the defendant at all the times herein mentioned, conducted extensive oil and gas operations on lands adjoining and in the vicinity of the lands of the plaintiff and said operations, so conducted upon plaintiff's said lands, were incident to and a part of defendant's general operations as aforesaid, and for the purpose of conducting said general operations, defendant made use of the right of entry upon plaintiff's lands under the terms of said lease.

11.

That by reason of the entry, conduct and actions of the defendant as aforesaid, and especially by reason of the breaking down of said fences and the opening up of roads as aforesaid, through said premises, the protection of said premises against the inroads of cattle and range stock was wholly destroyed, with the result that cattle and range stock were permitted to and did enter upon said premises and ate up and destroyed the grasses, growing crops and vegetables growing upon said premises and plaintiff was thereby wholly deprived of the use of said lands for general farming and stock-raising purposes and plaintiff [5] was forced and compelled thereby to abandon, and at all times since the spring

of 1920, plaintiff has abandoned the use of said premises for general farming, agricultural and stock-raising purposes, save and except that in the year 1920, plaintiff cut a partial crop of hay consisting of about 45 tons off of a portion of said lands.

12.

That but for the entry and conduct of the defendant as aforesaid, said premises were capable of producing and would have produced large quantities of hay, grain, corn, grasses and vegetables, and have afforded pasturage for plaintiff's stock-raising operations, all of which would have been of the reasonable value of not less than \$2500.00 per annum. That the damage to plaintiff's fences by reason of the entry aforesaid was and is the sum of \$1200.00. That the damage to plaintiff's said lands, by reason of the entry of the defendant as aforesaid in the construction of pipe-lines, telephone lines, tanks and power stations, and other structures thereon, the building and establishing of roads over and upon said lands as aforesaid, was and is of the reasonable value of \$4,000.00. That the damage resulting from the entry and operations aforesaid to plaintiff's established and successful farming and stock-raising business upon said premises, was and is the sum of \$2,500.00. That by virtue of the facts and circumstances hereinbefore set forth, and as a result of the acts of the defendant as aforesaid, plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) no part of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of (\$10,000.00) Ten Thousand Dollars, with interest thereon at the legal rate together with plaintiff's costs and disbursements herein.

FORD & CHOATE,
Attorneys for Plaintiffs. [6]

State of Montana,
County of Lewis and Clark,—ss.

S. C. Ford, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action and makes this verification for and on behalf of said plaintiff; That the reason why affiant makes said verification is that plaintiff is not now within the county of Lewis and Clark, state of Montana, in which said county affiant resides. That affiant has read the within and foregoing complaint and knows the contents thereof and that the matters stated therein are true to the best knowledge, information and belief of affiant.

S. C. FORD.

Subscribed and sworn to before me this 12th day of June, A. D. 1922.

[Seal] I. W. CHOATE,
Notary Public for the State of Montana, Residing
at Helena, Mont.

My commission expires February 9, 1925. [7]

Exhibit "A."**OIL AND GAS LEASE.**

THIS AGREEMENT, Made and entered into the 26th day of September, 1919, by and between ELLIS J. FIFER, of Mosby, Montana, party of the first part, hereinafter called lessor (whether one or more), and FRANK FRANTZ, of Casper, Wyo., party of the second part, lessee.

WITNESSETH; That, at the time of the ensealment and delivery of this contract the lessor declares and represents that said lessor is in the legal possession, and has good and lawful right to lease the hereinafter described *described* premises.

That the said lessor, for and in consideration of \$1.00 Dollars, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, on the part of the lessee to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, the laying of pipe lines, and building tanks, power, stations and structures, thereon, to produce, save and take care of said products, all that certain tract of land situate in the County of Fergus, State of Montana, described as follows, to wit:

E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Section 20, T. 15 N. R. 30
E. of M. M., N. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Section 21, T. 15
N. R. 30 E. of M. M., and containing 160 acres,
more or less.

The term of this lease shall be three (3) years from the date of this instrument, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises, the said lessee covenants and agrees:

1st. To deliver to the credit of the lessor, free of cost, in the pipe line to which said party may connect the wells, the equal one-eighth ($1/8$) part of all oil and gas produced and saved from said premises, or to pay to said lessor one-eighth part of the proceeds received from the sale of said oil or gas, either of them the option of the lessor, said option to be exercised not more than once in six months.

2nd. To keep accurate production records and books of account showing the amount of production, and the disposition thereof, derived from said premises, which books shall be open at all reasonable times during the business hours to the inspection of the lessor, so far as the same may apply to the production and disposition of production.

If no well be commenced on said land on or before [8] the 26th day of March, 1920, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit—successors, which shall continue as the depository for the payment of rentals and royalties and all other purposes herein mentioned, regardless of the changes in the ownership of said land, the sum of \$160.00 Dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for

twelve (12) months from said date. In like manner, and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable, as aforesaid, but also the lessee's option of extending that period, as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above-described land be a dry hole, then, and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payment of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

It is understood and agreed that all taxes and assessments levied against said land, or the produc-

tion therefrom, shall be paid by the respective parties in the proportion of the interest of each, in the production from said land, that is, one eighth ($1/8$) by the lessor and seven-eighths ($7/8$) by the lessee.

Lessee shall have the right to surrender any or all of the above-described premises, upon the payment to the lessor of One (\$1.00) Dollar and filing in the office of the County Clerk and Recorder of the county in which said premises are situate a written instrument of surrender of said premises, and shall thereafter be excused from doing any assessment or other work, or the payment of rentals, upon said premises so surrendered, provided that such instrument of surrender shall be filed before the first day of November, of the year in which said surrender is made. [9]

If the estate of either party hereto is assigned, and the privileges of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof, and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above-described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands

upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessee further agrees to pay to the lessor any damages caused to growing crops, fences, or other damages upon said premises, by the lessee or the lessee's agent.

IN WITNESS WHEREOF, the parties have signed this instrument this 26th day of September, 1919.

ELLIS J. FIFER,
Lessor.

FRANK FRANTZ,
Lessee.

Witnesses:

J. W. CLAYTON.

ALFRED R. LOWEY.

State of Montana,
County of Garfield,—ss.

On this 26th day of September, 1919, before me personally appeared Ellis J. Fifer, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto affixed my notarial seal this 26th day of September, 1919.

[Seal]

GEORGE G. GATES,
U. S. Commissioner.

My commission expires Sept. 19, 1921.

State of Wyoming,
County of Natrona,—ss.

On this 3d day of October, 1919, before me personally appeared Frank Frantz, to me known to be the persons described in and who executed the same as their free act and deed.

IN WITNESS WHEREOF, I have hereunto affixed my notarial seal this 3d day October, 1919.

[Seal]

ALFRED R. LOWEY,
Notary Public.

My commission expires Jan. 24, 1922.

Filed June 13, 1922. C. R. Garlow, Clerk. By
H. H. Walker, Deputy Clerk. [10]

Thereafter, on June 13, 1922, summons was duly issued herein, in the words and figures following, to wit: [11]

UNITED STATES OF AMERICA.

District Court of the United States, District of
Montana.

Action brought in the said District Court, and the
Complaint filed in the office of the Clerk of
said District Court, in the City of Helena,
County of Lewis & Clark. Assigned to Great
Falls Division.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Summons.

The President of the United States of America,
to the above-named defendant, The Frantz
Corporation; GREETING:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable GEO. M. BOURQUIN,
Judge of the United States District Court, District
of Montana, this 13th day of June, in the year of
our Lord one thousand nine hundred and twenty-
two, and of our Independence the 146.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk.

[Endorsed]: No. 1031. U. S. District Court,
District of Montana. E. J. Fifer vs. The Frantz
Corporation. Summons. Ford & Choate, Plain-
tiff's Attorneys, Helena, Montana. Filed July
5th, 1922. C. R. Garlow, Clerk. By Conrad G.
Kegel, Deputy Clerk. [12]

Service of the within summons together with copy of complaint acknowledged and accepted and copy had this 3d day of July, A. D. 1922.

THE FRANTZ CORPORATION.

By Chas. J. Marshall,
Attorney in Fact. [13]

Thereafter, on Oct. 26, 1922, answer of defendant was duly filed herein in the words and figures following, to wit:

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Answer.

Comes now the above-named defendant, by its attorney Chas. J. Marshall, and in answer to the complaint of plaintiff on file herein admits, denies and alleges as follows:

1.

Admits the allegations, matters and things pleaded in paragraphs one, two, three, four, six, seven and ten of said complaint.

2.

Denies generally and specifically each and every allegation, matter and thing pleaded on paragraphs

five, nine, eleven and twelve of said complaint, except defendant admits that it has not paid to plaintiff the sum of Ten Thousand Dollars, or any other sum.

3.

In answer to paragraphs eight of said complaint defendant admits that during the month of January, 1920, the said defendant, acting under and by virtue of the provisions of said lease set forth as Exhibit "A" in said complaint, entered upon a part of said lands and premises described in said complaint, for the purpose of mining and prospecting for oil and gas on said premises. Defendant admits that in carrying on said operations defendant opened some of the fences of plaintiff inclosing said lands, for the purpose of entering thereon, and establish certain roads over, [14] upon and across said lands, built pipe-lines thereon, constructed telephone lines, built tanks, power and pumping stations for the purpose of caring for and handling the production of oil produced upon the lands of plaintiff, and other lands, and built a water pumping station upon said lands to supply water for its operations in the Cat Creek field, all of which acts were done by defendant to carry out the terms of said oil and gas lease, a copy of which is attached to the complaint of plaintiff on file herein marked Exhibit "A," and by such reference made a part thereof. Denies that defendant done any acts other than such acts as were necessary to carry out the terms, conditions and stipulations of said oil and gas lease, and such

acts as were contemplated by the terms, conditions and stipulations of said oil and gas lease. Defendant alleges that all of said acts were done and performed for the mutual benefit of the plaintiff and defendant, and with the knowledge and consent of the plaintiff. Denies that defendant tore down any fences, or done any other acts to the damage of plaintiff, or other than as provided for by the terms of said oil and gas lease, and as contemplated under the terms, conditions and stipulations of said oil and gas lease.

4.

Denies that plaintiff has been damaged in the sum of Ten Thousand Dollars, or any other sum, or at all, through the acts of defendant, or through the acts of any agent or employee of the defendant for whom the defendant can be held responsible.

5.

Denies generally and specifically each and every allegation, matter and thing in said complaint pleaded, not hereinbefore specifically admitted, qualified or denied.

6.

Further answering the complaint of plaintiff on file herein, and for affirmative relief defendant alleges: [15]

1.

That there is another action pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the county of Fergus, between the same parties, for the same cause, and for the same relief.

WHEREFORE, defendant having answered the complaint of plaintiff on file herein demands judgment against said plaintiff as follows:

I.

That the complaint of plaintiff on file herein be dismissed.

II.

That plaintiff be denied the damages prayed for in his complaint on file herein, or any damages.

III.

That the defendant be allowed its costs and disbursements herein expended and incurred.

CHAS. J. MARSHALL,

Attorney for Defendant.

State of Montana,
County of Fergus,—ss.

Chas. J. Marshall, being first duly sworn on oath, deposes and says:

That he is the attorney for the defendant in the above-entitled action, and makes this verification for and on behalf of said defendant; that the reason affiant makes said verification is that the defendant The Frantz Corporation is a corporation, and that there are no officers of the defendant The Frantz Corporation within the county of Fergus, State of Montana, in which said county affiant resides; that affiant has read the within and foregoing answer of the defendant The Frantz Corporation, and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

CHAS. J. MARSHALL.

Subscribed and sworn to before me this 24th day of Oct., A. D. 1922. [16]

[Seal] R. S. HARRINGTON,
Notary Public for the State of Montana, Residing
at Lewistown.

My commission expires October 2d, 1923.

Filed Oct. 26, 1922. C. R. Garlow, Clerk. [17]

Thereafter, on June 12, 1923, reply to answer was filed herein, in the words and figures following, to wit:

In the United States District Court in and for the
District of Montana.

E. J. FIFER

vs.

THE FRANTZ CORPORATION.

Reply.

Now comes the plaintiff, and upon application to and by leave of Court first obtained, files this his reply to the answer of the defendant as follows:

1.

Replying to that portion of said answer denominated "For Affirmative Relief," plaintiff denies that there is another action pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the county of Fergus between the same parties for the same cause, and for the same relief and further denies that any action is pending between said parties in any other

court upon the same cause or for the same relief as is asked for herein.

WHEREFORE, plaintiff prays as in his complaint herein.

FORD & CHOATE,
Attorneys for Plaintiff.

Service of foregoing reply admitted and copy received.

CHAS. J. MARSHALL,
Attorney for Defendant. [18]

State of Montana,
County of Lewis and Clark,—ss.

I. W. Choate, being first duly sworn on oath deposes and says: That he is a member of the firm of Ford and Choate, and is one of the attorneys for the plaintiff in the above-entitled action.

That affiant makes this verification for and on behalf of said plaintiff, for the reason that said plaintiff resides in the county of Fergus, State of Montana and is now absent from the county of Lewis and Clark, State of Montana, in which said county, to wit, in the city of Helena, Montana, affiant resides.

That affiant has read the within and foregoing reply and knows the contents thereof and that the matters and things therein stated are true to the best knowledge, information and belief of affiant.

I. W. CHOATE.

Subscribed and sworn to before me this 4th day of June, A. D. 1923.

[Seal]

H. G. PICKETT,
Notary Public for the State of Montana, Residing
in Helena, Montana.

My commission expires February 26th, 1924.

Filed June 12, 1923. C. R. Garlow, Clerk. By
Conrad G. Kegel, Deputy Clerk. [19]

In the United States District Court, District of
Montana.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Verdict.

We, the jury in the above-entitled cause hereby find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages at the sum of Thirty-five Hundred (\$3500.00).

FRANK A. RICHARDS,

Foreman.

Filed June 19, 1923. C. R. Garlow, Clerk. By
H. H. Walker, Deputy Clerk. [20]

Thereafter, on June 23, 1923, judgment was duly entered herein in the words and figures following, to wit:

In the United States District Court, District of
Montana.

#1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Judgment.

The above-entitled action came on regularly for trial on June 18th, 1923. The plaintiff appeared in person and by his attorneys, Ford and Choate, of Helena, Montana, and the defendant appeared by its attorneys Messrs. Stewart and Brown of Helena, Montana, and Mr. Charles J. Marshall of Lewistown, Montana. A jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and the defendant were sworn and testified on direct and cross-examination. After hearing the evidence the argument of counsel and the instructions of the Court, the jury retired to consider their verdict, and thereupon returned into court a written verdict signed by the foreman of said jury finding the issues in said action in favor of the plaintiff

and against the defendant and assessing the plaintiff's damages at the sum of \$3500.00.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of Thirty-five Hundred Dollars (\$3500.00), with interest thereon at the rate of 8% per annum from the date hereof until paid, together with the said plaintiff's costs and disbursements incurred in said action amounting to the sum of \$185.70.

Judgment rendered June 23d, 1923.

C. R. GARLOW.

By Conrad G. Kegel,
Deputy. [21]

Thereafter, on July 30, 1923, petition for a new trial was duly filed herein, being in the words and figures following, to wit: [22]

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION, a Corporation,
Defendant.

Petition for New Trial.

Comes now the above-named defendant and within the time allowed by the rules of this Court,

the order of the Court and stipulation of the parties herein, files this its petition for a new trial and respectfully petitions the above-entitled court, and Honorable George M. Bourquin, Judge thereof, to grant the defendant a new trial upon the ground and for the reasons:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice.

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's rights of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and approximately caused by causes that were expressly relieved and excused from by the agreement of the parties. [23]

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and approximately caused by causes, some of which were from defendant's action, some of which were by the action of others, and most of which were by action on the part of the defendant, damages for which had been ex-

pressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is totally insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages.

III.

Errors at law occurring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant reserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for the reason that the building and use of roads upon said premises was authorized by the lease [24] agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the

Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

“Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation?”

“A. I have been offered seventy-five dollars an acre for it all the way through.” (Tr. page 15.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

“Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?” (Tr. 27.)

f. The Court erred in refusing to allow the witness, Landz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr. 55.)

g. The Court erred in sustaining the plaintiff's objection to the following question asked of witness Lantz:

“Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?” (Tr. 55.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

Q. "What was the cost of that pumping station?" (Tr. 65, 66.) [25]

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

"A. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?" (Tr. 66.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sonntag:

"Q. Have you had occasion to rent the surface-right privileges for use similar to what you have here under substantially similar conditions as are in existence on the Fifer tract?" and in sustaining plaintiff's objection to the following question asked the same witness:

"Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?"

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

"We offer to prove by the witness on the stand, L. F. Sonntag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands

here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year.

Mr. FORD.—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

“The COURT.—The offer is denied and exception may be noted.” (Tr. 69, 70.)

k. The Court erred in sustaining plaintiff's objection to the question asked of the witness Hilger relative to the value of alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr. 76, 77.) [26]

l. The Court erred in sustaining plaintiff's objection to the following question asked of the witness Downing:

“Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?” (Tr. 82.)

IV.

The Court erred in refusing defendant's motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, which objections and exceptions are as follows:

“Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court’s instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court in its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to the fences from other outside or inde-

pendent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction [27] of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be

but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case."

Defendants asked for and was allowed exceptions as stated. This petition to be based upon the pleadings herein. A bill of exceptions to be hereafter settled herein, the minutes of the Court and Clerk's minutes herein.

WHEREFORE, the defendant prays that it be granted a new trial of said cause.

Dated this 28th day of July, 1923.

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Defendant.

Due personal service of within petition for new trial made and admitted and receipt of copy acknowledged this 30th day of July, 1923.

FORD & CHOATE,
Attorneys for Plaintiff.

Filed July 30, 1923. C. R. Garlow, Clerk. [28]

Thereafter, on August 7th, 1923, defendant's bill of exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to wit: [29]

WITNESSES.

	Direct	Cross	Redirect	Recross
E. J. Fifer	1	16	22	
Al Dixon	23	27	29	
L. E. Routin	29	34		
Charles W. Sandridge	35	36		
Frank Fifer	36	None		
E. J. Fifer (Recalled)	37	37		
Motion to Amend Pleadings				37
Plaintiff rests				38
DEFENDANT'S CASE:				
Carl C. Adams	38	39		
Charles J. Marshall	40	None		
L. S. Landz	43	50	54	55
L. F. Sontag	56	64	68	
Defendant's Offer of Proof				69
David Hilger	70	73	76	78
Walter O. Downing	78	80	82	
Defendant rests				82
PLAINTIFF'S REBUTTAL:				
E. J. Fifer	82	82		
Defendant's Motion for Directed Verdict				83
Plaintiff's Motion for Directed Verdict				83
Court's Instructions to Jury				84
Defendant's Exceptions to Court's Instructions				94

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. J. FIFER,

Plaintiff,

vs.

THE FRANZ CORPORATION, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED That, heretofore, to wit, on the eighteenth day of June, A. D. 1923, at Great Falls, Montana, the above-entitled cause came on regularly for trial, before Honorable George M. Bourquin, Judge of the above-entitled Court, and a Jury of twelve persons, duly empanelled and sworn to try the issues in said cause; Messrs. Ford and Choate appearing for the plaintiff; Mr. Charles J. Marshall and Mr. John G. Brown appearing for the defendant; whereupon the following proceedings were had and done therein:

Testimony of E. J. Fifer, in His Own Behalf.

E. J. FIFER, the plaintiff herein, a witness called and sworn on his own behalf, testified as follows:

Direct Examination by Mr. FORD.

My name is E. J. Fifer. I reside now at Lewistown, Montana. I am the plaintiff in this action

(Testimony of E. J. Fifer.)

and am the owner of the land described in this complaint, and have owned it since the winter of 1913 and 1914. This land is located on the Mussellshell River in an L shape, in Sections 20 and 21. The Mussellshell River cuts off one corner of my east forty and I have got something like six or eight acres on the east side of the river. The east forty or maybe fifty acres, I don't know exactly how many acres, is irrigated with ditches from a coulee. It is built up from the south half, [31—1] comes from the bad lands down this coulee and filled in above water level; it is deposited vegetation and stuff that would wash in there maybe ten or fifteen feet deep. It is built-in bottom land. At the time I acquired this bottom land, it was timber, underbrush, willows and buck-brush. I cut and burned and cleaned it up and built ditches all over so the water would cover every bit of that east side of the river. The remaining 120 acres of the land, there is a coulee running up there about ten acres in that coulee, about similar land, filled in there, out of that west eighty, and then there is an L-40 there, and south it is filled in some, but of a little different character. There is a mountain on the south forty, on the one-half, on the east, and a mountain on the west, and it gives drainage between the mountains; it lies square in between, and there is a coulee comes down on the southwest corner which carries considerable water.

At the time this lease was entered into between myself and Mr. Franz, I had a four wire, galvanized

(Testimony of E. J. Fifer.)

wire, fence, cedar posts set all the way around; cross-fenced. The posts in the fence around were set twenty feet apart. The entire tract was surrounded with a fence of that character. I had a cross-fence at the east where my buildings were; I always called it between forty-five and fifty acres, and this irrigated land was cut off, that is, the east forty was fenced off. In addition to that east forty, there is about ten acres, or something like that, included in that cross-fence. There is 150 to 200 feet more to the west over a quarter of a mile. The road went right along the river, and I cut this off from the road to keep it all included, and ran from the corner of this cross-fence right around to the north fence, around to my house, leaving the road on the outside of my fence. It went across the corner of this forty-acre tract, followed the river all the way around; the southeast corner. It would be on the south and east side of the east forty-acre tract. The line runs a little northeast there. I had [32—2] hay corrals, stock corrals, a barn, sheds, cow sheds, ice houses, tool house, chicken-house, two houses 16 feet by 20, and another cellar and a chicken-house and a lavatory. These improvements outside of the lavatory, were made of logs.

With reference to the cultivation of this land, I had always, ever since I went there, cultivated, stayed there, right steady.

The COURT.—You were asked what you cultivated; tell us?

(Testimony of E. J. Fifer.)

The WITNESS.—Something like thirty-five acres in this one tract, on the east forty, and in the south forty I had about twenty-five acres more broken up there. On the east forty I had planted corn, vegetables, sugar beets and hay. There is a well there. I ran sugar beets, corn and hogs, and afterwards I turned it into hay and cattle. At the time the land was leased to Mr. Franz, I was growing principally hay on this east forty. Including that across the river, I had about thirty-five acres of hay; maybe a little more. There were something like four or five acres of that forty acre tract that were used for general gardening purposes. I had this twenty-five or thirty acre tract on the southwest sowed to sweet clover about the first of September. There were about thirty acres in sweet clover. The land in this coulee that runs up through the place, I had that sowed to sweet clover, reinforced the pasture all over with sweet clover, to make better pasture of it. The balance of the land that I have not described, I used that for pasture grazing land is what I figured that. At the time this lease was entered into, I was engaged in farming; hay and stock was what I was getting into, preparing for and getting into. The paper marked "Exhibit No. 1, for the Plaintiff," is the lease that I gave to the Franz people or Mr. Frank Franz.

Plaintiff's Exhibit No. 1, thereupon offered and received in evidence without objection, being read to the jury, is in words and figures as follows, to wit: [33—3]

(Testimony of E. J. Fifer.)

The WITNESS.—After the execution of this lease, the Franz Corporation, commenced hauling in sometime the last part of November, to commence drilling operations in that vicinity, and I think they spudded in in December, 1919. The Discovery well was located about 800 or 900 feet south of my land, of my south line, and also to the west; there is just one forty between the well and to the west. The Franz Corporation was carrying on these operations.

Q. And what other drilling operations did the Franz Corporation conduct in that,—in or near the vicinity of your land?

The COURT.—What does that have to do with this case?

Mr. FORD.—It shows that they used this land in connection with their general operations in the field.

The COURT.—Proceed.

WITNESS.—The boarding-house and camp was a couple of hundred feet off my place; they drilled the discovery well and the Franz-Charles 2; the discovery well in on the Charles land, and the O'Day well, lying south of me; they always had to cross me; then the wells in 2 and 18, which is located across the river in Garfield county. They had to haul all this through my bottom land.

Q. And in their operations in driving to and from those wells across the river, they passed through and upon your land?

A. They made a camp and they all pulled through to the camp.

(Testimony of E. J. Fifer.)

Mr. MARSHALL.—We object to these long answers.

The COURT.—Read the question.

The WITNESS.—They did. There were other operations in the vicinity of my land that I have not yet told you about. There is the Franz-Brown well, and the Franz-Brown well No. 1 and No. 2, three wells in there. In their general operations, hauling materials back and forth, I think the Franz people themselves had about five [34—4] four-horse teams. Quite a good many other people were employed by them at different times. In the earlier part of these operations, I have seen fifteen or twenty teams in twenty-four hours, that is, hired people, and everything, freighting back and forth. In their operations in hauling over and across my land, they came into my land near the northwest corner. They made a road there. At the time they commenced their operations, my fence was in a first-class shape, gates and everything. In hauling back and forth over my place, the Franz people opened the fence or gates; sometimes they didn't go through the gates at all; they would go through a fence, if they did, I don't think it was ever up twenty-four hours after that.

Mr. MARSHALL.—We object to what the witness thinks.

The COURT.—What fences did they tear down?

The WITNESS.—They tore down first on the north, then south, diagonally across the place. The fence now is practically all open everywhere, some

(Testimony of E. J. Fifer.)

gone, removed. In the early operations, in the first place, they opened the fence on the northeast and came diagonally across to their camp to the south; opened it then in two places, and then there was the gates; you know they hauled those big camp wagons and left the fences down; had to go north and south, and moved it, before they got their big camp built. After they would take down the fence, they were never repaired and put back up. I have gone over a good many times and did that. Lots of times the wire was tacked down to the lower post when they drove over it first, but other teams came along driving over it, and they would hook into that wire and pull it every old place, around over the place. In the spring of 1920, the fence was down different places around the place. In 1920 I rebuilt the fence and worked practically all that summer running stock and building fences. In the spring of 1920 before I commenced farming operations, my time was spent in repairing fences and hunting cattle, and fixing fences [35—5] and gates. In the Spring of 1920, I put in a full and complete new fence, about sixty rods by the coulee, where all the wire and posts were gone; I put that in the second time. The reasonable value for the materials and work that I performed there in making those repairs varies; the wire, I think I paid \$5.50 for the spools, and posts, and then my time. My time all that Summer was in that line of work. It ought to be worth \$100 a month, the way the wages were then, for my time, besides the materials. I started

(Testimony of E. J. Fifer.)

in about the first of March, 1920, and put in my time at that work up to September. I could not keep up the fences and keep the stock out of my land in 1920.

The range stock and Franz' horses were pastured on the clover that I had in on the South forty. It is a stock country around there; Mr. O'Day right adjoining me had 100 head, and there is stock on every side of us. There are quite a lot of stock ranges in that vicinity. I had a nice stand of clover on that thirty acre tract in the Spring of 1920, and did not get a thing from that crop during that season because the stock, range stock and horses, ate it up, kept it ate down, fed on it, and kept it right down to the ground.

On the tract of forty or forty-five acres on the east, in 1920, I got about forty-five and three-quarters tons of hay in one cutting. I only got that one cutting from that land that year. During a portion of the growing season, the stock broke in on me. I did not get anything out of it. I always cut it in October, the last crop, and they broke in on me along about September. I cut the first crop in 1920 right after the fourth, about the fifth; at that time, after I had cut the crop, the condition was fair; pretty good; about half of it was about first crop, about one-half a crop. I had been fighting all the time to keep the fence up, but after they had been cut, after the harvest, I was not so particular in regard to that; they kept breaking in, [36—6] and after the pasture got short outside of that they

(Testimony of E. J. Fifer.)

would break into this very green pasture. After cutting my first crop in 1920, I was not able to keep the range stock out of the pasture, and have got nothing from that place since cutting the crop in 1920. I got no second crop from that place. On the tract of land across the river, that was open to the public after the first crop but the river was up and protected it during the first crop. I let a fellow cut that that put this hay up. After the first crop from the land across the river, the river went down and it was like the rest of the field all over. I got but the one crop from that small tract across the river during the period of 1920. That was alfalfa.

The general conditions during the remainder of the season with reference to moisture were good; subirrigated ground, towards the river; it was good. Had the fences been up the rest of that year, I would have gotten two more cuttings of alfalfa from that land and field. In my judgment it would have gone a ton and a half per acre, per cutting, the last two crops, or, a total of three tons for the remainder of the season. I said I had about six acres across the river in that tract.

The plat marked "Exhibit No. 2 for Plaintiff" I have examined, and it represents pretty well this tract of land concerning which I have been testifying. The tract of land which I have been testifying about, to the east of the river, is the spot there in the lower corner. The value of the pasture upon the land after I had cut my crops for the year 1920, had my fences been up, the entire tract for 1920,

(Testimony of E. J. Fifer.)

would have been about \$150. I got no pasture from that place in 1920.

The fences in the spring of 1921 were torn down entirely and the entire tract of land was open to the range stock. Along about March, 1921, I went down on that piece of forty and fixed up the fence and drove the stock out. I couldn't do anything with reference to the other portions of the fence; the roads were all mixed up and cut up, [37—7] and I didn't try to do anything. That spring I repaired the fence all around the place, all around this forty acres. I was about three days there on the first time, and drove the stock all out, and fixed up the fence. I had to furnish posts and the wire to repair it. I should judge the reasonable value of my time and the materials furnished for that purpose was twenty or twenty-five dollars. There were no crops raised on any of this land in 1921. The moisture conditions in that country were all right in the spring to start with. Referring to the south forty that was planted to clover, in my judgment, considering the weather conditions, that tract in 1921 would have produced probably a ton to the acre, one crop; it was a little dry the last part of it. Considering the general conditions with reference to moisture in that year, in my opinion, the bottom land would have produced a usual crop for the first crop, and maybe a little shorter and pasture for the second. That tract in 1921 would have produced between thirty and forty tons, but I got nothing from it. In 1921, we had to keep the fence up

(Testimony of E. J. Fifer.)

around the forty acre tract. I sent my brother and his wife down there and they stayed all summer. We were not able to keep the fence up and keep the range stock and the stock belonging to the Franz Corporation out of the tract during the summer of 1921. The reason for the loss of my crop in 1921 was through the fences being torn down and the roads and the traffic and business through the place and the range stock.

In the spring of 1922 there were no fences kept up around the outside. The old man there had a little patch of garden fenced up. The outside fences were all torn down and scattered around and the land was open to the range stock during the year 1922, as much as any land is; open to the public. During the years 1921 and 1922, the range stock was grazing upon this land. The general conditions in that country with reference to moisture were a little better in the spring of 1922 than some of the other years. That thirty acre tract in the south forty in 1922, had it not been for the fact that the fences were down, [38—8] ought to have had two cuttings, and ought to have been about a ton and a half to the acre for each cutting. The forty acre tract on the river during 1922 should have produced about forty or forty-five tons; that does not include the hay that I would have received from the patch across the river, the east tract west of the river. In 1921 that tract across the river ought to have gone about two tons to the cutting to the acre, and three cuttings. In 1922 that same tract across

(Testimony of E. J. Fifer.)

the river should have produced about the same, two tons to the cutting. The market value of alfalfa hay in that community in the fall of 1920, in the stack, was about fifteen to seventeen dollars, along there, eighteen dollars. The cost of the cutting and stacking was about two dollars a ton, I suppose. In 1921, I don't know what the market value of the hay was in that vicinity. I know some alfalfa sold at twenty dollars. I don't know what the market value of clover was in that vicinity in 1922. In 1921 the market value of blue joint in that vicinity was thirty to forty. I don't know what the market value of blue joint was in the fall of 1922. I wasn't right in that locality. The value of the pasturage on this tract of land for the season of 1921 was about one hundred and fifty dollars, and its value in the fall of 1922 was about the same; about a dollar an acre with everything cut.

During all of this period of time, the Franz Corporation was conducting its operations, as I testified this morning. By an examination of the plat, you can tell just what roads were established on my property by the Franz Corporation. This plat correctly shows the roads that were established on my property by the Franz people on their lease. Most of those roads are graded.

Q. Now, in the operations and hauling back and forth through there, can you tell us whether or not they used the roads entirely?

The COURT.—How do you mean?

(Testimony of E. J. Fifer.)

Mr. FORD.—Well, if they just used the roads.
[39—9]

The COURT.—If they limited themselves to the road?

Mr. FORD.—Yes, sir.

The WITNESS.—No, sir; not altogether. If when it became necessary for them to turn off here and there in this direction and that direction, they did so, wherever they were hauling to.

Q. Now, what pipe-lines, power houses, and so forth, were constructed upon your place by the Franz Corporation, if you know?

A. Why, the pumping-plant and pipe-lines—water-line and pipe-line and pumping-plant.

Q. What is the foundation of the pumping-plant built of? A. Cement.

Mr. MARSHALL.—We desire to offer an objection to this line of testimony as proof of damage. The damage alleged so far and proved up to the present time is loss of pasturage a year and loss of alfalfa each year. If he has lost the use of his premises he has proved the damage. This wouldn't be an element of damage on the pleading in the case.

Mr. FORD.—It is a permanent injury to his property.

The COURT.—Well, what is your theory in respect to that, the pumping-plant?

Mr. FORD.—Our theory is if there have been any permanent damages effected upon this property that we are entitled to recover for them.

The COURT.—In what way, permanent damage?

(Testimony of E. J. Fifer.)

Mr. FORD.—Well, for example, take the power station built there, concrete foundation.

The COURT.—The pumping-plant, is that what you mean?

Mr. FORD.—Yes, the pumping-plant.

The COURT.—Is it there yet?

Mr. FORD.—It is there yet.

The COURT.—You have a right to show that. You can proceed. [40—10]

Whereupon the defendant then and there duly excepted to the ruling of the court.

The WITNESS.—The Franz Corporation also placed upon the property five or six tanks, storage tanks. There have also been built three pipe-lines in and upon the property.

The COURT.—The lease provides for this.

Mr. FORD.—Yes, but it also provides for any damage done, that they will pay any damage done to growing crops, fences or any other damages.

The COURT.—How can you call it a damage when the contract calls for them to do that, both parties; that is, if they were built for this land?

Mr. FORD.—We will show they were used in connection with their general operations, not only for this land but for their operations on other lands.

The COURT.—Can you make any showing that they were built for use in connection with this land?

Mr. FORD.—In connection with this land?

The COURT.—Can you show a segregation of damages because they were used in connection with other land?

(Testimony of E. J. Fifer.)

Mr. FORD.—Possibly not, but the position we take is that they had a right to go in and build these power-lines or tanks or any other work necessary in connection with their operations, they had that right, but they have stipulated that whatever the damage is that they will pay for.

The COURT.—Yes, growing crops, fences and other damages. I doubt if you can find any authority, in view of the contract, in the operation of mining or leasing of your premises, so far as the soil is concerned, that any of these necessary operations would be considered a damage. You might as well sink a score of wells and say he is damaged in the piles of slush thrown out, [41—11] and in mining the tunnels run. Have you any authority to sustain you?

Mr. FORD.—So far we have not. This is a peculiar lease because of the written portion contained in here, if the Court will examine the lease; it is a printed lease, but this clause is written in, the parties having contracted to pay the damage. I am frank to say we can find no authority.

The COURT.—When we see some of these papers come into Court, we are frank to say we don't see how they can do business without a guardian.

Mr. FORD.—But a lease of this character is strictly construed against the lessee and in favor of the lessor, and the lessee having contracted to pay any damage, it is not limited, it is unlimited, to pay plaintiff damages that resulted.

The COURT.—Well, I will hold that any damage like to the crops or fences that these parties would

(Testimony of E. J. Fifer.)

do in carrying on their legitimate operations would of course be within that term of the lease I think, but damage which would accrue by reason of their sinking a well or placing a pipe-line to convey the oil or water for the benefit of both parties, the injury that would do wouldn't be called damages. I can't understand any principle of law that would call that a damage; if it is a damage it is without injury, because it is the very thing you contemplate shall be done; they might carry on their operations, such as they have bound themselves to do by this lease, without doing any damage to crops or to fences if they were careful enough, and hence not necessary, but these things that they must necessarily do, like placing your pipe-line, sinking your well, pumping, I don't think that even this lease, as crudely drawn, would consider that a damage. Certainly parties acting together wouldn't call that a damage to the land; no, that is the very thing they were going to do to pour wealth into the pockets of both of them. I think [42—12] I would place that construction on it, in the absence of any authority from the standpoint of principle and reason; but if they have placed on there instrumentalities that are not for this particular land, to carry out this particular lease, seeking to make it the base of operations for their other surrounding lands, that were not contemplated by the parties, I think you might show it; it will be a matter to be shown to the jury; make the best proof of any damage on that that you can and it will be for the jury to determine to the best of their judgment whether it is

(Testimony of E. J. Fifer.)

in fact a damage in the sense of the word. I think you may show the entire situation as far as you think it necessary.

The WITNESS.—Operations were commenced upon my place by the Franz Corporation in 1921, I believe. The Montacal well was brought in in 1921.

The COURT.—Is that the Frantz Corporation?

Mr. FORD.—The Franz Corporation.

The COURT.—The defendant?

Mr. FORD.—The defendant.

The COURT.—That is when they commenced?

Mr. FORD.—That is when they commenced operating on their property drilling for oil.

The COURT.—You are limiting it to the operation of drilling?

Mr. FORD.—That is what I should have said.

The COURT.—I assume that this showing you have so far made is assigned by you to the Franz Corporation?

Mr. FORD.—Yes.

The WITNESS.—If I remember right, it was in May, 1921, that the Franz Corporation commenced drilling upon my land. I think it was in 1921 that the power station and these tanks were constructed upon my place; about the same time, if I remember right, that the Franz people commenced drilling upon the place for oil. [43—13]

The power station, in connection with the operations in the field, is used for the storage of oil, for my place and other places, they have got storage tanks there when they pump from there out to Winnett; I think they have a couple of 500-barrel

(Testimony of E. J. Fifer.)

tanks. The oil produced from the wells on my place is stored in those tanks, and I think from the Charles lease and probably 26. I haven't run out the pipe-line exactly, but the storage tanks are right there close to the power-plant. They also have a water-line running on top of the ground, a two-inch line. The water is taken from the O'Day well, off of my land, and from the power-station it is pumped to the west camp and wherever they want to use it.

Q. Now, Mr. Fifer, will you tell us what in your judgment has been the damage to your premises by reason of the construction of these roads that you have testified to, the building of the power-station and such other of those matters, these tanks, etc., that has resulted in damage to your place.

Mr. MARSHALL.—We will object to that, upon the grounds and for the reason it is not a proper proof for damages and not the proper proof of damages under the pleadings in this case.

The COURT.—What were these roads built for, for his land or the other land?

Mr. FORD.—They were built, I think the testimony shows, before they commenced drilling on his land, in the general operations in the field. It is alleged they were used for this purpose in connection with general operations and that is admitted in the answer.

The COURT.—I think you can get at that portion of it then—that certainly is not within the lease at all if roads were put on there to facilitate operations on other lands; that is a plain ordinary tort; I think you can show that by showing the value of

(Testimony of E. J. Fifer.)

the land before it was done and value of [44—14] the land afterwards. That is the proper rule for damages.

Q. Mr. Fifer, referring now to the tract of land west of the river in the east forty, upon which the power-station and those lines are built, what was the value of that land prior to the placing of those buildings and roads upon the property?

Mr. MARSHALL.—We will object upon the ground and for the reason the witness is not qualified to testify to the value of those lands prior to the encroachment or otherwise or at all.

The COURT.—I think so; he is the owner; every man is assumed to know something within reason of the value of his own property. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—It being covered with water and under ditches, I think it is worth about one hundred and fifty to seventy-five dollars an acre. Confined to this strip here, and after the use and the placing of those buildings and other instrumentalities upon the place by the defendant, now, I wouldn't know how to make taxes off of it.

The COURT.—What is its value to sell to anyone not bound to buy and to whom you are not obliged to sell?

The WITNESS.—A thousand dollars would be a big price, for all of it.

Q. What was the value of your entire tract of land prior to the entry by the Franz Corporation?

(Testimony of E. J. Fifer.)

A. I have been offered seventy-five dollars an acre for it all the way through.

Mr. MARSHALL.—We move that the answer be stricken as not responsive.

Motion denied and exception noted.

The WITNESS.—Seventy-five dollars an acre. After the entry upon the land by the Franz Corporation and the establishment of these roads and power-station and pipe-lines, and so forth, it is of no value for what I want to use it for. At that time, after their entry [45—15] and the construction of these roads, its value was a couple of thousand dollars; something like that. This plat shows in a general way the coulee that comes down through my land. From 1914 until I left there in 1920 I had appropriated the waters from that coulee. I had built ditches and kept them up and made them all across that forty down there. The water was taken from the coulee at its mouth, and run down into the field, and then the tract is split off every way on the high places. I had a complete distributing system and I could cover every foot of this forty-acre bottom on the west side of the river. The tract on the south forty that is in sweet clover, a little coulee ran in the southwest corner of that forty, and I ran right along the west side of it a ditch to lead the water high upon the hill so as to distribute it out over this ground.

That plat indicates the cross-fence that I built along about fifty acres there. The cross-fence comes down and is tied to the south line about in the direction you have indicated there, by the letters A, B.

(Testimony of E. J. Fifer.)

Then I had a gate right in there. My line fence is about as you indicate there by the letters C, D. At the time this action was brought in 1922, all of the fences were torn down. I am familiar with the cost of construction of fences. In my judgment it would cost about sixty dollars a quarter, for the red cedar posts and four galvanized wire, to replace the fences that have been torn down in connection with the operations of the Franz Corporation. I had three quarters on the north, two on the west, one on the south and then on the east and south; this cross-fence here, a quarter, and then one in and around, and a line fence I described a few minutes ago, and one crossing the river. I believe the price of two dollars per ton would cover the cost of producing and stacking the hay during the years 1920, 1921 and 1922.

Cross-examination.

(By Mr. MARSHALL.)

The WITNESS.—I filed on this land as a homestead in the winter of [46—16] 1913 and 1914. I squatted it first. When I first went down there and located on the land, it was surveyed, but hadn't been accepted by the Government. My filing was made in the winter of 1913 and 1914, and I submitted my final proof in September of 1914, I think. The land is joined immediately on the north by section 16, a school section. I have got a fence along my north line. I built all of that fence south of the school section, in 1914 and 1915. I have three forties running along the north side and one forty

(Testimony of E. J. Fifer.)

off to the south. I run for half a mile on 16 and a quarter of a mile on 17, on the north. In the fall of 1919 I gave to Frank Franz an oil and gas lease upon this acreage, which has been introduced as an exhibit in this case. In the fall of 1919 the Franz Corporation began operations looking toward the drilling of a well in the immediate vicinity of my land. The well was south of me, a quarter less than two hundred and twenty feet south of my south line. It was an offset to Mr. O'Day's. I think it was about the middle of December that they was rigging up for to begin active drilling operations upon the Charles tract. In 1913, when I went down to squat upon this ranch, there was no public highway passing over the property. There was no highway passing over my property south of me right down the river. It was east of me. Beginning at the very extreme northwest corner there was a trail there, passing down, and sometimes it was used by the settlers on the Musselshell river for the purpose of reaching up in the Cat Creek field proper. That was before the Franz people built a new road through there. From 1915 up to 1919, I had a gate to the entrance of my northwest corner to let my stock out to the public land. It was a four wire fence, a farmer's gate. That wasn't a road running along down through my place to the center line of the Musselshell river. It was an outlet from my field to the coulee there. At the time when I first went down to my place, there was a crossing just below my place there. They crossed just below my place. It was known as Sand

(Testimony of E. J. Fifer.)

Springs Crossing. As early as 1908 there was a ford, but not [47—17] opposite my house; there was two fords, but further down the river. The ford did not come across my place; it hit on 16, but afterwards we made a ford right there by my barn.

I recognize the photograph which you hand me as being that of my barn and hay, some of my buildings. This photograph which you hand me I recognize as being a photograph of the river bottom just below my house on the flat there, and my east line fence running across the river there. This third photograph which you hand me I don't recognize as being a photograph of my garden, as to looking towards the power plant of the company. That looks somewheres in 16, north of my place.

The COURT.—What is the object of these photographs?

Mr. MARSHALL.—The object of this is to show the actual condition of the property.

The COURT.—Haven't you the photographer who took them?

Mr. MARSHALL.—Yes.

The COURT.—You can identify them in due course of time. No use puzzling the witness.

Mr. MARSHALL.—All right.

The WITNESS.—The Franz people have drilled two wells on my property, one known as Fifer One and the other as Fifer Two. Fifer One is drilled as an offset to Charles well on the south line, on the east forty. That is the well in the extreme east forty there, as an offset to the Charles Number 2.

(Testimony of E. J. Fifer.)

It was necessary for the Franz Corporation in drilling that well to haul material to the place, materials, rig timbers, casing and matters of that kind. They hauled this material from the West Camp somewhere, and it was necessary for them to cross down across my property for that purpose. They drilled Fifer Number Two well at the northwest corner, the northwest of the northwest of Section 21. That is an offset well. It was necessary for the Franz people to haul material such as rig timbers and casing and matters of that kind for the purpose of drilling this well. I [48—18] guess that is the road that is represented on that plat where they hauled this material. I don't know, because I was not on the place all the time when the wells were being drilled. I left the place in 1920; I was back and forth all the time. I was there when they were drilling the Franz-Fifer Number 1 and Franz-Fifer Number 2, and knew it was necessary for these people to use these highways on my place for hauling the material for those wells. The oil from Fifer Number 1 and Fifer Number 2 was pumped into the storage tanks on the eastern end of the field, and then pumped from that point to Winnett, I suppose. It is necessary to use the pipe-lines across my land for the purpose of gathering my oil and other oils, and depositing it in the tanks, and then in turn pumping it back to the town of Winnett. This pump-house is used for the purpose of pumping water and oil from my place and other premises. This 160 acres

(Testimony of E. J. Fifer.)

of land owned by me is something like 26 miles from the town of Winnett. Winnett is my nearest railroad point, and is the point to which this oil is transported. I suppose it is necessary to use water for the drilling of those oil wells by the Franz company. It was necessary to lay these pipelines for the purpose of carrying oil to drill the wells on my place in connection with the operations of the Franz lease, and other places, too. There is a telephone line across my property to the power plant that is used in connection with the operation of this and other properties in that vicinity. There is a public highway running the extreme length of my place, coming in at the extreme northwest corner, coming down the center of the 120 acres to the Musselshell river. It is graded now; I don't know whether Fergus County owns it or not; the Franz Corporation built it. The Montecal people have been operating a portion of my lands; Franz sold and peddled eighty acres of it. They have been operating a part of my land, but I don't know whether through legitimate contracts or not. The Montecal people have drilled one well upon my acreage, and they have drilled another, and it was necessary for them in the drilling of these wells to use highways and roads [49—19] for the purpose of hauling material in. The Montecal well is a producing well, but I don't know whether that oil is transported down to the large tanks, or whether it is turned into the pipe-line direct. On the extreme south forty of mine there were two other

(Testimony of E. J. Fifer.)

outlets occupying that property, the Williams Syndicate well was drilled in this southern point, and also the Lucky Lucile. It was also necessary, in connection with the drilling of those wells, to haul material across my land. It was also necessary to lay pipe-lines for the purpose of having water to drill those wells, upon my acreage. I don't know exactly how many acres I have actually got in meadow alfalfa land. I measured it once by tap line that ran on the eighty-rod spool of wire, and then a little more. There is a raise about three or four feet high around the meadow lands on the west and on the south. My irrigation ditch runs up to the bottom of that bluff. I opened it above just above on 17, is where the notice was put up; and cut that ditch around and built it up, confining it to the channel. For the purpose of irrigating this land, my meadow land and alfalfa land, I take the water from Brown's Coulee. That is the ranch adjoining me on the north. I have appropriated fifty miner's inches for that purpose, and when there is water that water is conveyed down through the coulee to my ditch on this high bank. There are some springs up the coulee, and they run into this coulee and down the coulee. You are correct when you say that the waters ran down through the coulee and out here under this bank where the irrigating ditch runs, and then my laterals spread out over the meadow and the alfalfa field. I have in the neighborhood of five or six acres over across the river that is not irrigated. It subirrigates

(Testimony of E. J. Fifer.)

from the river. The Franz people have a road that runs right across that into Mitchell's. This map does not show any roads over across the river. I don't think the Franz people occupy any of this land with pipe-lines across the river. That section is all open to the public. The other [50—20] fence is torn down; it all runs off and is cut off from it on the outside. The only point of entrance to my place to the north and west is right by my house, is where the road went across this ford before you people got in there, and went right to my northeast corner. That is the road that runs in front of my house and into the school section. The county road or public highway enters my property at the northwest corner now. It hits my place exactly in the center, right straight through pretty near three quarters of a mile. This land lying north and south is all sage-brush and cactus. When you get up above the meadow, going north, where all of these operations are concerned, you hit the hill there; the bottom land is at the foot of the hill. The rest of it is all sage-brush land. It is all broken land up north of me. There are no hills on mine at all. There is a portion of level ground over here on my extreme southern quarter, and to the west is hills, all the way west. There is sage-brush and cactus on all of those hills. I claim that with my feed and pasture, I would get \$150.00 a year, including 1921 and 1922, for that pasture land. I did get it, selling it that way, taking stock and feeding them. By selling the hay harvested and

(Testimony of E. J. Fifer.)

renting the pasture with it, would bring me \$150.00 a year. I had to have feed to feed them during a storm, and pasture; then, I could sell it separate and get a good price. In 1921 and 1922 it was of no value for that purpose because there were no fences. I left the place and moved to Lewistown late in the fall of 1920. In 1921, in the spring I tried to save that little garden there, put out a garden and this meadow and ran the stock out and fixed the fence up, and then my brother came out. The last two years I have not had it leased. There was an osteopath doctor camped there. Mr. Crawford has a garden there. He stayed there as much as he did last year; he works there, doctor of osteopath business, and stays there and raises a little garden. In 1920, when the Franz people entered upon this land for the purpose of developing [51—21] it in connection with other lands, I raised a good crop of alfalfa that year; that was the first year. I cut over that one patch and got something like forty-five tons. In 1921 I did not cut any at all, and in 1922 I wasn't there. The old fellow cut a little. There is a stack of hay there now that has been there since 1920. I haven't sold that. When I noticed the fences were down I certainly did attempt to repair them so the range stock couldn't get in there, but I was not successful in keeping them up. As a matter of fact, the range cattle got on to the premises. I had the meadow all cross-fenced. The Franz Corporation or any other corporation did not tear down my cross-

(Testimony of E. J. Fifer.)

fence the first year. I was kept pretty busy that year, that was the first year that they were in there, trying to keep all of it up and gave it all up except this one patch the hay was in until the hay was cut. In 1920 practically no injury was done to the meadow lands because the fence was kept up until after the first crop. Under water there I ordinarily would get two crops of hay. I have cut two crops several years; in the last five years, I don't think I have. Sometimes I would cut a few acres out and leave a good pasture; that is where I would feed it all. This ranch is right on the bottom, in the breaks of the Musselshell river. The meadow land is right down in the bottom; the breaks are surrounding it; that is the reason it makes it good; you have good pasture and good range, and that is what makes it worth more.

Redirect Examination.

(By Mr. FORD.)

The WITNESS.—At the time the Franz people came into this country and operating in the vicinity of my land, there was a main traveled highway east of me. At that time, through my property they followed the river bank and went out through a gate. There was a gate went out right straight west. That road went straight out and then went south. The road that went through my field came in right here and ran right down and followed the river right down, the river bank, and we had a gate in there, and it came out and went right straight south. There [52—22] were no roads whatever

(Testimony of E. J. Fifer.)

leading from the west end of my place over across the place. There were no public roads of any kind other than the one I have indicated, along the bank of my place, and I built that one. The reason I left my place in the fall of 1920 was that I sold off my cattle and chickens, because I couldn't keep my place and operate it, because the fences were torn down and kept torn down, and I tried all summer to keep them up, and I sold my stuff until further operations, until they either got out of there so that I could start in again and start in new if they didn't make a success.

Witness excused.

Testimony of Al. Dixon, for Plaintiff.

Whereupon AL. DIXON, called and sworn as a witness on behalf of the plaintiff testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Al Dixon. I live on the Musselshell river, about one mile north of the place owned by Mr. Fifer. I am acquainted with the Fifer place and have been ever since he came into the country. I am acquainted with the improvements upon the place during the year 1919. I know that the place was fenced. At that time there was a fence all the way around the outside of the place, a good four-wire fence, with posts twenty feet apart. That irrigated piece of land was fenced in with a four-wire fence, and then he had a little lane on the

(Testimony of Al. Dixon.)

southeast of that irrigated piece, and he had that so he could shut it in and use it for pasture, and he had a piece of fence on each side of the river. I am familiar with his irrigation system there. The coulee came down and opened up about the edge of that tract, and he protected the banks on that coulee some so as to fetch it down on to his land, and he made laterals and ditches and spread the water out there. I have seen all of that bottom land flooded with the waters that came from that coulee. I am familiar with this south forty acres. It is kind of a basin; there is a hill on the east of it. A portion of the hill comes inside of the fence, and on the west of the hill a portion of it comes inside the fence [53—23] and the northwest corner of it, there is some rough breaky kind of coulees, but the big portion of it is a basin. Mr. Fifer plowed some furrows and made a piece of a ditch there, with reference to distributing any flood waters that might come down from the hills. The effect of the plowing of those furrows would be to the benefit of throwing that water out over that ground south and east. I know the general character of this land across the river. In 1920 he had alfalfa planted and growing in there. The general moisture conditions in that country in 1920 were good. I was growing alfalfa at that time myself.

Q. What, in your opinion, how many tons of hay could have been harvested from this tract of land across the river during the year 1920?

Mr. MARSHALL.—We will object upon the

(Testimony of Al. Dixon.)

ground and for the reason the witness is not qualified.

The COURT.—Well, do you know the land?

A. Yes, sir.

The COURT.—I think he may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—I saw that ground before they cut the first crop and when they were cutting it, and I would consider a ton or better to the acre. In my judgment that land would have been safe for a second crop. I believe on the second crop it would have produced a ton or better. On a third crop, there is a possible show for something. I knew there was a crop planted in the south quarter, but I paid no attention to it. Clover yields in that country on similar lands to this south forty anywhere from a ton to two tons to the acre. I know what other lands in this vicinity produce. I paid no particular attention to them in the year 1920; just in riding through there and seeing them, or seeing the size of the grass, it would be safe to say it would go a ton to the acre. [54—24] Considering what other lands produced and the general conditions, in 1920, I would say this thirty or forty acres in sweet clover would have produced a ton to the acre. The value of the pasturage on the entire tract in 1920 after the crops were harvested would be about a dollar an acre. I don't know what the general conditions in that vicinity were in the sum-

(Testimony of Al. Dixon.)

mer of 1921; I wasn't there. I returned to that country about the middle of February, 1922. The general conditions with reference to moisture in that locality in 1922 were good. In 1922, I believe the forty acre meadow that was raising blue-joint would have produced thirty-five or forty tons. The tract across the river would have produced in that year on the first cutting a ton and a half or two tons to the arce. I believe it would have produced a second crop in 1922. The production of that crop at that time would have been a ton or a ton and a half.

Q. And what in your judgment would have been the yield per acre, what would have been the yield of the sweet clover in the south portion of the south forty? A. A ton and a half.

Mr. MARSHALL.—We object to that because there is no evidence to show it was in sweet clover in 1922.

Mr. FORD.—No, there was no crop.

The COURT.—I suppose that is what they are complaining of.

Mr. MARSHALL.—There is no proof with reference to a crop in 1920, 1921 or 1922.

The COURT.—My recollection is that the witness testified he had put in sweet clover; I don't know what year he says he put it in.

Mr. FORD.—The fall of 1919.

The COURT.—Could we take judicial notice that it is a perennial crop or is it an annual?

(Testimony of Al. Dixon.)

Q. Does sweet clover require sowing each year?

A. No, sir.

Q. It is a perennial crop? A. It is a biennial crop, if I understand it right. [55—25]

The COURT.—The objection will be overruled?

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—I said in my judgment it would have produced in 1922 a ton or better to the acre. In my judgment there would not have been a second crop. The value of the pasturage upon the entire tract for the year 1922 would have been about a dollar an acre. The market value of hay, clover and alfalfa, in the fall of 1920 was \$15.00 a ton in the stack, but I don't know what the market value of the blue joint was. The relative value of blue joint is considered pretty near twice as good as alfalfa, and worth twice as much. The alfalfa was selling for \$15.00 in the stack. The market value of alfalfa and clover in that vicinity in the fall of 1922 was \$15.00. With the ordinary care that is given alfalfa or sweet clover, after it is once planted, if it is not irrigated, why, two dollars a ton would cover the cost in that community to produce, cut and stack alfalfa and blue joint; that is, not irrigated. There would be an additional charge, of course, if the land was irrigated. I wouldn't undertake to answer what it would cost per acre to irrigate this bottom land of Mr. Fifer's, because it might mean considerable work and it might mean a little. I am acquainted with the

(Testimony of Al. Dixon.)

value of property in the immediate vicinity of this land to some extent. I have an idea as to the value of this Fifer tract of land prior to the entry, or at the time of the entry by the Franz people in 1920; I don't know what he wanted for it, though. The idea is based upon what grew on it, what money was derived from it. There is no other lands in that vicinity that will compare up with that irrigated land, because we haven't got facilities to irrigate. When we irrigate it costs money. That is the only irrigated land in that country, right in that vicinity.

Q. What, in your judgment, was the value of this land in [56—26] 1919 at the time of the entry by the Franz people?

Mr. MARSHALL.—We object on the ground that the witness is not qualified to answer, proper foundation has not been laid.

The COURT.—I think he may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—A matter of sixty-five to seventy dollars an acre. I am familiar with the roads, buildings, pipe-lines and power-house and so forth that have been placed upon there since the entry by the Franz people.

Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?

Mr. MARSHALL.—We offer the same objections

(Testimony of Al. Dixon.)

as to the proof; not the proper element of damage under the pleadings in this case.

The COURT.—You may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Five dollars an acre. I know in a general way the cost of building fences in that country. In my judgment, it would cost to build a mile of fence, four wires, galvanized wire, with cedar posts twenty feet apart, about \$250.00.

Cross-examination by Mr. MARSHALL.

The WITNESS.—I know of land having been sold in that immediate vicinity during the past ten years. There was a place sold at Mosby nine years ago. That is eight miles away. That was the Charles place, and the price paid for it was \$25.00 an acre, I understand; it is all hearsay with me. I don't know that of my own personal knowledge. I don't know whether the school section to the north of this particular tract of land was sold or not. I have been told it was sold, but that is hearsay. I base the value of \$75.00 an acre on this land on the money derived from it, raising crops on it. It depends on how hard a man works, on [57—27 how much of this land could be cropped. There is considerable of that entire one hundred and sixty acres that can be farmed successfully, and that is not farmed. In my opinion, there is thirty-five or forty acres of this meadow land on this place of the irrigated land. There has been alfalfa on all of this place, but the blue joint has

(Testimony of Al. Dixon.)

killed it out a good deal. Across the river there are about six or eight acres of alfalfa. There is possibly two or three acres that have been in garden for the past three years and is in garden. Outside of the meadow, the alfalfa and the garden, there has been a part of the south forty that has been farmed during the time that I have lived there. I never measured it to find out how much, but I have seen a crop growing on probably half of it. That was in oats planted by Mr. Fifer, I believe in 1915, as near as I can recollect. I have a farm down there and raise a few cattle. This Fifer place is bounded on the north by the school section, and that is under lease to a Mr. Weaver, who is in the stock business, and also bounded on the north by Harry Brown's homestead, which is patented land. On the south it is bounded by the Charles tract and all the country down there is a stock country. This place is in the breaks of the Mussellshell river and a part of it goes down in the bottom land. I have seen the Musselshell River overflow there in the spring in high water, and in the winter when the ice would go out, and in the summer they would cut hay, two tons of hay on it. It is not possible to raise any crops on the west side of the river down by his house. I knew this place in 1908. At that time a man squatted in there, but if I remember right, he was serving a term in the Deer Lodge Penitentiary. At that time there was an old trail there that was passable under conditions, going across the entire 120 acres that was

(Testimony of Al. Dixon.)

used by the public in going from the northwest corner of what is now the Fifer Homestead to the point of the river where this house is. It was an old trail down there, [58—28] and you could ford the river at that point. At that time in 1908, the ford was not at this Fifer place where you cross the river to go to Sand Springs, but possibly a third to a half a mile down at the other point.

Redirect Examination by Mr. FORD.

The WITNESS.—As near as I can remember, the ford at the Fifer place, at his buildings, was constructed, or I used that first myself in about 1911. The road was down at the other crossing, down the river. In 1919 when the Franz Corporation began its operations on the Fifer place, the main traveled highway that was used by the public at the time was right up in front of his house along the river bank. I guess the point indicated by your pencil is approximately it. It came right in there by his corner and cut across his land, right around his river bank and up through there. That is the main traveled highway. There was a dim trail that used to be used up through there. It was used as a public highway in 1919, off and on, if a man wanted to go that way. There was a gate there to keep it shut. The character of that Charles tract that was sold some nine years ago down by Mosby, a small portion of it was made soil, and the biggest portion of it was rough, high ground; no portion of it was irrigated.

Witness excused.

Testimony of L. E. Routin, for Plaintiff.

L. E. ROUTIN, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—My name is L. E. Routin. I live on the Mussellshell River about two miles north of Mosby. I am farming and stock-raising. My land is situated about two miles south and one mile east of the Fifer tract of land. I grow alfalfa on my place, but it is not irrigated. It is dry. I have known the Fifer tract of land for about sixteen years. At the time Mr. Fifer filed on this land in 1913 or 1914, it was covered with [59—29] cottonwood timber, greasewood, dead cottonwoods, rose briars, driftwood from this coulee. It has been cleared out since. I have cleared about twenty-five or thirty acres, in that kind of work.

Q. What would it cost to clear that forty-acre tract?

Mr. MARSHALL.—We will object upon the ground and reason it is incompetent, irrelevant and immaterial.

The COURT.—I think so.

Mr. FORD.—I think it goes something to the value of the property.

The COURT.—Oh, no; if he has knowledge of the value of the land after it was cleared, that is the value. The objection will be sustained.

The WITNESS.—The fences around the Fifer tract of land in 1919 at the time the Franz people

(Testimony of L. E. Routin.)

came in there were good. They were built of cedar posts and four galvanized wires. I should judge the posts were about twenty feet apart. There were some cross fences; there was one a little bit west from the west line of the east forty running across for a quarter of a mile to the south line of that forty, and then turned and went down the river and leaving an outlet back up into these upper forties. It extended across there you might say a quarter of a mile outside of a line wide enough to drive a wagon or a team through, or what a man would naturally want for an outlet from his buildings. I don't know how long the other fence was; I never measured it, but it was almost a quarter of a mile long. I know how Mr. Fifer irrigated his place. He went to work and cleaned up this piece of land and cleaned the coulee out away back up clear across his place and kept it so the water would keep on down until it got on to his certain piece of land that he wanted to irrigate; then he went to work and dug the ditches and ran laterals out. I believe he built a dam where this cross fence was, near there, I believe it was right at [60—30] the fence. His system of ditches and laterals would probably irrigate better than three-fourths of his meadow, on the east forty, starting in from the northwest corner of forty; it would irrigate probably thirty acres or thirty-five out of the forty. I was acquainted with the small tract of land across the river. It was in alfalfa. In 1920, the general conditions there with reference to moisture in that

(Testimony of L. E. Routin.)

vicinity were fairly good. On this tract of land across the river, considering general conditions, that character of land, practically every year since I have been in the state of Montana, will cut three crops of alfalfa. It would usually start in at about two or two and a half tons to the acre, and dwindle down to a ton and possibly a little less at the last cutting. The big cutting is the first crop. The south forty laid in between the hills practically level; you might say it drains from the foot of those hills into the center of the forty from both ways, that is, it kind of cups down in, but practically, you might say, level; what a person would call practically level. I know that he built a ditch on the west side of that forty, coming out of a coulee there at the corner of the forty, for the purpose of distributing flood waters over that land. I know that in the fall of 1920 he sowed it to sweet clover. That kind of land put into sweet clover will usually cut somewhere from a ton to a ton and a half, possibly two tons to an acre. In 1921 the moisture conditions were about the same as the year before. Under ordinary conditions, that east forty, the bottom land, I don't believe that I ever saw it cut less than from thirty-five to forty-five tons. I knew it to cut forty-five tons. It usually ran from thirty-five to forty-five tons every year. On that tract east of the river in 1921, I should judge you would get during the season—I don't know how many acres there are over there—ten or fifteen—I suppose possibly three or four

(Testimony of L. E. Routin.)

tons to the acre during the season, the three cuttings. Considering the conditions that existed in [61—31] 1921 with reference to this thirty acres of sweet clover in the south forty, in my judgment, that sweet clover usually cuts most any year from a ton to two tons per acre on that character of land; that is, after the first crop. I said a while ago that in 1920 it would have produced a ton to a ton and a half per acre. The reason it was producing more in 1921 than in 1920 was it always gets better after the first year. Last year, in 1922, the general moisture conditions in that vicinity were pretty good. Considering the conditions that existed last year, this bottom land of blue joint would have produced—it will always produce a ton and a half to the acre, possibly cut four or five tons most any year, and I think it would have produced that in 1922. With reference to the small tract across the river, in the year 1922 I think that would have produced three to four tons, any year. That south forty, for the year 1922, I should judge it would produce as much as any other year. I said it would run any year from a ton to two tons per acre. I think it would have produced that in 1922 on that character of land. The market price of hay in that country in the fall of 1920 in the stack was fifteen dollars a ton. The price of alfalfa and clover in that vicinity in the fall of 1921 in the stack, alfalfa was twenty-five dollars and clover was twenty dollars; the market price of blue joint hay in that country in the stack was from thirty to forty dollars. The market price

(Testimony of L. E. Routin.)

of alfalfa in that community in the fall of 1922 was twenty dollars; sweet clover was fifteen dollars, and blue joint hay was—I can't say that I know of any blue joint hay selling last year at all, but I never knew in the last ten years of good blue joint hay selling for less than twenty-five dollars. I would take one ton of blue joint hay any time in preference to two of alfalfa. Blue joint hay is always worth approximately twice as much as alfalfa. During the years of 1920, 1921 and 1922, in my judgment, the reasonable value of the [62—32] pasturage upon the Fifer tract per year would have been one hundred dollars. I think I know the values in this vicinity and the vicinity of the Fifer tract of land.

Q. What in your judgment, Mr. Routin, was the value of the Fifer tract of land prior to the entry of the Franz corporation?

Mr. MARSHALL.—We will object to that upon the ground and for the reason the proper foundation has not been laid, this witness testifying he thinks he knows the valuation.

The COURT.—Not shown to be qualified; objection sustained.

The WITNESS.—That opinion is based upon offers that I have seen made and by myself, the price that I have been offered for my land, and with that information I would judge that I know the value of the land.

Q. Then what, in your judgment, was the value

(Testimony of L. E. Routin.)

of this land at the time of the entry of The Franz Corporation?

Mr. MARSHALL.—The same objection.

The COURT.—Any sales made around there in recent years of like lands?

A. Not any in less than eight years I don't believe that I can think of.

The COURT.—You have land of your own?

A. Yes, sir.

The COURT.—Farming it? A. Yes.

The COURT.—Know what this land produces?

A. Of Mr. Fifer's?

The COURT.—Yes.

A. Yes, sir.

The COURT.—Does that enter into your method of calculating the value? A. Not exactly, no, sir.

The COURT.—Only would express an opinion.

Q. In considering the value of the Fifer tract, do you consider the crops that it is capable of producing?

A. That is the way I would place valuation on any land. [63—33]

Q. That is the way you place valuation on any land? A. Yes, sir.

Mr. FORD.—I don't think he understood your Honor's question.

The COURT.—Perhaps not. Proceed.

Q. What in your judgment, Mr. Routin, was the value of the Fifer tract at the time of the entry of the Frantz Corporation?

(Testimony of L. E. Routin.)

Mr. MARSHALL.—We will object upon the ground and for the reason the witness is not qualified and not a proper proof of damage in an action of this nature under the pleadings in this case.

The COURT.—This witness farms in this locality, knows the products of land, and upon that he says now he places his judgment of value. All owners have some idea of values. How much weight will be given to it is for the jury. Overruled. Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Five thousand dollars. The value of the land after the entry of the Franz people and the building of these roads and the general condition that now prevails there at the present time it is absolutely worthless so far as value is concerned to the surface. It has no value whatever. I am familiar with the cost of building fences in that locality. I have never figured it up as a whole, but the wire would cost \$5.50 a hundred at the railroad, thirty miles from there. It would be worth \$6.25 on the river. The cedar posts on the river would cost about 20 cents apiece. It would cost ten cents apiece to dig the post holes and cut the posts. I couldn't say what it would cost to string the wire.

Cross-examination.

(By Mr. MARSHALL.)

The WITNESS.—I couldn't say how many crops of alfalfa were [64—34] cut off this Fifer field in 1918, nor how many crops were cut off of the

(Testimony of L. E. Routin.)

meadow during that year. I don't say that I know how many crops were taken off the alfalfa, off of the meadow in 1919. I suppose the yield would naturally depend on the number of crops cut. The alfalfa on the other side of the river was not irrigated during the year 1919; never has been. I have no idea how many cuttings were taken off of it in 1919. That piece across the river is not irrigated. There was one crop taken from the meadow land during 1920. I think the meadow land produced about 45 tons during the year 1920. I estimate there are about 30 or 35 acres in that meadow land, and about 5 to 6 or 7 acres in alfalfa; I never measured it. I never measured the sweet clover, but there must be about thirty acres in that. I didn't know there was a public highway on this place, but I know where the graded road is through there. I said I estimate the value of that property before the Franz people entered upon it during the year 1919, to be \$5000.00, right around \$30.00 an acre. The meadow land and the alfalfa land is worth more than the balance of the land. This land is about thirty miles from market. This place, the entire acreage of 160 acres on the flat; it is not in the breaks of the Musselshell River. I know where the Fifer place is, and practically every bit of it is all down on the flat of the Musselshell River.

Witness excused.

Testimony of Charles W. Sandridge, for Plaintiff.

Whereupon CHARLES W. SANDRIDGE, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—My name is Charles W. Sandridge. I live at Lewistown, Montana. In the fall of 1919 I was down on the Musselshell river at my brother-in-law's. I was employed by the Franz Corporation in the spring of 1920. At that time I was driving a team, and I am acquainted with the Fifer tract of land by crossing over it. We hauled supplies and freight over the Fifer place in [65—35] the spring of 1920. I know where the patch of clover is located on the south side of the place. I was down there about three months, and during that time there was range stock in the place, and after it began to get a little dry we turned the horses out nights used by the Franz Corporation, and they would pasture around in there and up on top of the hill, and range stock likewise pastured in there.

Cross-examination by Mr. MARSHALL.

The WITNESS.—At the time I worked for the Franz people hauling materials back and across this place, there was a gang helped fix the fence up once or twice, I believe.

Q. What were your instructions with reference to passing over this acreage?

(Testimony of Charles W. Sandridge.)

Mr. FORD.—Objected to, irrelevant and immaterial.

The COURT.—Sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Witness excused.

Testimony of Frank Fifer, for Plaintiff.

Whereupon FRANK FIFER, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. CHOATE:

The WITNESS.—My name is Frank Fifer. I am a brother of the plaintiff in this case. I am familiar with the land owned by my brother, and have known it for about five years. In the year 1921 I was out on my brother's ranch. I got out there in the neighborhood of the 25th day of May; I can't give you the exact date, of 1921. I stayed there right along until after the first of August. During that time I put in a garden, fixed some fence, and helped harvest. I had very poor success in attempting to raise a garden; I didn't get any to speak of. The reason I did not get a garden was on account of the cattle getting in there and eating it up about the time it [66—36] would do any good. During the time I was there I fastened up the wire, and I set some posts, and put in stakes between the posts to keep the cattle from crowding through the wire, crawling through, but I was not able to keep the fence in such condition of repair as to turn the stock and keep them out of the prem-

(Testimony of Frank Fifer.)

ises. The general condition of those fences in the year 1921 while I was there was bad over all portions of the land. They were down in several places. The range cattle came on to the premises during that time. There were no crops of hay produced on the premises that year because the cattle ate up what was there, and what the oil didn't kill the cattle got.

Witness excused.

**Testimony of E. J. Fifer, in His Own Behalf
(Recalled).**

Whereupon E. J. FIFER, the plaintiff herein, recalled as a witness for and on his own behalf, testified as follows:

Direct Examination by Mr. FORD.

The WITNESS.—I would judge that it cost fifty dollars a year to irrigate the tract of land that I had under irrigation, the forty acres; that is, keeping up the ditches, laterals and attention and water.

Cross-examination by Mr. MARSHALL.

The WITNESS.—That would be for the irrigating season, along up to August, from the spring of the year. I would have to keep the ditches open, according to the amount of trash and stuff that flowed in down on me; it varied so much; sometimes it would run a whole lot, and sometimes quite a bit more.

Witness excused.

Mr. CHOATE.—The plaintiff at this time asks leave of Court to amend his pleading to conform to

the proof in the following particulars: To amend line 25 of section 12 of the Complaint by inserting, instead of the words and figures five hundred dollars (\$500.00) the words and figures "twelve hundred dollars (\$1200.00)," making the sentence read "that the damage to plaintiff's fences by reason of [67—37] the entry aforesaid was and is the sum of twelve hundred dollars (\$1200.00)."

Also for leave to amend line 31 of the same section 12 by inserting, in lieu of the figures \$2,000.00 the figures "\$4,000.00," making the sentence read "that the damage to plaintiff's said land by reason of the entry of the defendant aforesaid was and is of the value of \$4,000.00."

We make that offer to make the pleadings conform to the proof.

The COURT.—It may be done.

The plaintiff rests.

DEFENDANT'S CASE.

Testimony of Carl C. Adams, for Defendant.

Whereupon CARL C. ADAMS, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—My name is Carl C. Adams, and my business is that of a civil engineer. I made a survey and measurement of the lands involved in this controversy, known as the Fifer ranch; I did that under the direction of counsel. I took the

(Testimony of Carl C. Adams.)

exact measurements and locations of various areas and territories, and from those measurements, surveys, and locations, the plat which you have in your hand is the plane-table sheet which I used in making that survey. That plat substantially shows the territory in question with the permanent objects located thereon, and was made from exact measurements.

Said plat was thereupon offered in evidence as Exhibit Number 5 for the defendant, and admitted without objection.

The WITNESS.—The system of tinting the different areas on the plat there corresponds with the system of tinting of the legend on the plat, and designates the character of land. The pipe-lines, roadways, drainage ditches, drainage ponds or irrigation ponds are all located and marked as such on the plat. I have no location of [68—38] the telephone line, and as to the ponds I should not call them irrigation ponds, for the reason that they are settling ponds to separate the pumpage water from the oil wells from such line as may be used. In the east forty, in the so-called meadow that has been under controversy here, from my measurements there are two cultivated tracts of land there which total 5.53 acres; there are three tracts of sod or meadow land which total 11.84 acres, making a total of 17.37 acres. I also measured the tract known as the garden tracts there, and they are included in the first part of my statement. Those area measurements are carried on to the map and inserted

(Testimony of Carl C. Adams.)

there. The camp and tanks and pumping stations, are all also shown and indicated on the map there; the camps on the premises; the Charles camp is not definitely located. That is a camp that is off the premises.

Cross-examination by Mr. FORD.

The WITNESS.—I said my business was that of a civil engineer, and I am following my profession at the present time. I am also statistician of the Montana Oil & Gas Association. The Franz Corporation is a member of that association. This plat shows the total number of acres in the so-called east forty west of the river, with the exception of that portion which is covered by timber, tinted yellow; I made no attempt to determine that for the reason that it was not under cultivation, or could not be under cultivation. I do not know as a matter of fact that that entire tract where there are a few cottonwood trees was in timothy and alfalfa. That is not in accord with my impression at the time I was there. It looked like the ordinary underbrush of a cottonwood timbered area. I mean by underbrush the rose-bush and willows on the first bench. The willows and rose-bushes were not so very high. In the vicinity of the buildings there it was cleared off, but I didn't get the impression that the tract of land which has cottonwood trees growing on it has been cleared and farmed, either broken up or farmed as meadow. There are approximately 25 acres included in that forty-acre tract west of the river, on the [69—39] east

(Testimony of Carl C. Adams.)

forty. I did not go across the river on the survey, and the right or easterly bank of the river as designated on the plat was estimated by me. I saw no cultivated land over there, and for that reason did not attempt to extend my actual survey on that side of the river. The yellow indicates a timbered area. I saw from across the river that cottonwood trees such as one would ordinarily find were growing there, on this tract across the river in this east forty. I couldn't tell whether it had ever been cultivated. It may have been in cultivation at some time. I did not measure the width of the river, but at its present stage I estimated it to be an average width of 200 feet. That is an estimate. At ordinary stages, it is considerably narrower than that in some places, but the river is rather high just now.

Witness excused.

Mr. BROWN.—We may be able to stipulate as to the next witness: The photographs thta will now be identified and located as to location and direction upon the map, Defendant's Exhibit 5, may be located and their direction given by witness Marshall without objection as to his later participating in any manner in the case, subject to the objection as to the time of their taking.

Testimony of Charles J. Marshall, for Defendant.

Whereupon CHARLES J. MARSHALL, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—These photographs that have just been stipulated to were taken three days ago under my direction.

Picture 1, which is marked “Exhibit 4 for Defendant,” was taken in the northeast corner of the northeast corner, about 20 feet from the extreme corner, and is a panorama view looking due south showing the eastern fence of the Fifer tract.

No. 2, which is now marked Exhibit 3 for the defendant, was taken approximately at that point looking towards the buildings on the Fifer claim. [70—40]

Picture No. 4, which is marked as Exhibit No. 6 for the Defendant, was taken six feet south of No. 2, Exhibit No. 3, and is a panorama view looking across the garden towards the pump-house and the tanks of the Franz Corporation.

Exhibit No. 7, picture No. 4, is taken at a point 220 feet from the south boundary line of the Fifer claim and directly on the raise west of Fifer No. 2 well, looking due west.

Exhibit No. 8 is a photograph taken about 10 feet from the boundary line between the school section and the Fifer claim and at about the quarter corner common, on the raise, a panorama view looking

(Testimony of Charles J. Marshall.)

over the garden spot and the meadows of E. J. Fifer, including the stable and the power-plant of the defendant. If you wanted to look over the portion of the ranch which is known as the meadow, as it exists to-day, you could take Exhibit No. 3, which would show the houses, Exhibit No. 6, which would show across the garden, and Exhibit No. 8, which would show back against the other two views, and could see the entire tract with the exception of this corner across the river.

Exhibit No. 9 is a view from this point at 280 feet. That is, 280 feet south of the location of the camera for No. 8. That was looking due west along the section line between the school section and the Fifer claim.

Exhibit No. 10 is a view taken from the public road near the center of the northwest quarter of the northwest quarter of section 21 in Township 15, looking northwesterly between the Fifer No. 1 and the Montecal-Fifer No. 1.

Exhibit No. 11 is taken 220 feet north of the section corner common to the southeast quarter of the northeast quarter of Section 20, and the northeast quarter of the northeast quarter Section 20, looking southwesterly across the southeast quarter of the northeast quarter of Section 20; that is, looking southwest; looking across the quarter which in this lawsuit has been commonly referred [71—41] to as the south quarter.

Exhibit No. 12 is a picture taken from a point 220 feet in from the corner upon which No. 11 is

(Testimony of Charles J. Marshall.)

based, 220 feet in, 220 feet north, looking across this section of this map. That is, looking across this same south section, but looking directly south.

Exhibit No. 13 is a picture taken 220 feet from this corner looking northeasterly across the south-east quarter of the southeast quarter of Section 20.

Exhibit No. 14 is a picture taken from the road directly east and somewhat north of the cabin shown in the northeast quarter of the northeast quarter of Section 20, being a panorama view down the public road as designated there toward the Fifer buildings and toward the river.

Exhibit No. 14 would give you a panorama view of almost his entire tract, with the exception of what is known as the south forty, as you would approach the ranch from the common highway.

Exhibit No. 15 is taken in this portion, about 100 feet from the public highway, where it enters upon the Fifer tract, looking due east, the picture showing the line fence between the school section and the Fifer tract.

Mr. BROWN.—We offer the photographs which have been thus identified and located on Exhibit No. 5 in evidence.

Mr. FORD.—To which the plaintiff objects on the ground that there is no testimony showing that the same condition existed at the time the pictures were taken and the time the injuries complained of were committed; therefore incompetent, irrelevant and immaterial.

The COURT.—There may be some force to that objection.

(Testimony of Charles J. Marshall.)

Mr. BROWN.—We expect to connect it up.

The COURT.—Very well, if you promise to make the connection they will be received. [72—42]

Mr. BROWN.—I promise to make the connection.

The COURT.—The objection is overruled, and if not connected up ruling will be made accordingly.

Witness excused.

Testimony of L. S. Landz, for Defendant.

Whereupon L. S. LANDZ, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is L. S. Landz. My business is oil production superintendent. I was employed in the vicinity of the Fifer tract in the Cat Creek field in 1919, 1920 and 1921. I went there on the 20th day of October, 1919, and stayed until September 1921. A Mr. Sontag succeeded me. I am familiar with the general view of the ground and the character of it, as I went there in 1919; also familiar with it when I left there in 1921. I can identify Exhibits Nos. 3, 4, 7, 9, 10, 11, 12, 13 and 15 as showing the ground and lands in the same condition, except for permanent structures, as I knew it during the times I was there. On Exhibit No. 14 I can identify the ground and other conditions as being the same, with the exception of the road, and these buildings were constructed, and these tanks were set after I went there. Out-

(Testimony of L. S. Landz.)

side of that it is the same, with the exception, I believe, that plowed ground is a little different from the way it was when I first went there.

Exhibit No. 6 has structures in it that were not there when I went there, consisting of the pump-house and tanks, and there is more plowing showing than when I was there.

Exhibit No. 8, except for the additional pump-house over in the corner and more plowed ground, is the same as when I was first there. When I first went to the field in 1919 I was employed as superintendent of field work. When I first went to the field, I entered the Fifer lands, referring to Exhibit No. 5, on the north line near Mr. Fifer's house; we then crossed the river at the crossing just in front of Mr. [73—43] Fifer's house, and then we recrossed the river and went south practically following the river on an old trail which led south of Mr. O'Day's farm through the Charles farm, which is directly south of that. The Charles tract is directly south of the Fifer land, and the O'Day place is still further south. We first conducted our operations in there on the Charles tract. In taking up the operations it was necessary to haul in heavy machinery and timber to do the drilling. When we started moving in the machinery and drilling apparatus, we entered the Fifer tract near the northwest corner of his tract, following an old trail. That was near the location of photograph No. 15. We then took a course which is practically the same as the road which is marked

(Testimony of L. S. Landz.)

on that map as a highway. At the time we entered first and at the time we entered later to take up this work Mr. Fifer and everyone else was very pleased to have us there, and I had no kick whatever from any of them on our crossing the land or using it. He had some gates and we endeavored to keep those gates closed. On the 19th of February, just as soon as we had completed the No. 1 well on the Charles, which is practically 1100 feet south of Mr. Fifer's line, and it became known that we had oil, of course, there was a rush, and in those operations, and the rush, the roadway we are now using was used in going in; that is the same road that was indicated in a southerly course across the Fifer tract. There was also a stampede to the east and they used that roadway, and a roadway that came into Mr. Fifer's house to the south, the road indicated on here as the Weaver Trail. The first drilling we started on the Fifer tract was the No. 1 Fifer in the spring of 1921, it was spudded in. That is the location the engineer gave as Franz-Fifer No. 1. To get to the Franz-Fifer No. 1 from the roadway it was necessary to put in another roadway and a bridge crossing a coulee. That road is the roadway used exclusively in the development of the Franz-Fifer No. 1. That road was used exclusively by the Franz people first in that development, and not used by the general rush. In building that road, the reason [74—44] we didn't go directly across from the westerly or directly north from the southerly and immediately

(Testimony of L. S. Landz.)

below it, because it is rough country. That is indicated by the dark line on the map there and there is a nasty shale hill just across that coulee. We had to go lower down that coulee in order to cross it, to pull a decent load to this location. There were other short roads made from that vicinity and also to the road to the Montacal-Fifer No. 1, and they were used exclusively by the Montacal for the purposes of moving material, tanks and equipment, and for the handling of the production on the Fifer tract, and for no other purpose. Just before I left there, we constructed a road into the pump station which we built, which Mr. Fifer admitted. We made that road there from the main road over to the pump-house. At that time there was no old road from the pump-house on that connection, going up to Weaver's. The road which went up to Weaver's was this other road, the other line of which following the river, and Mr. Fifer had a fence built near the river bank. The road was outside of the fence. The purpose of building that road from the main highway over to the pump-house was for moving material to build the pump-house, to pump the oil and water from the John O'Day water well to different operations in the field. It was necessary to pump water in the Fifer tract to develop the Montacal and Fifer wells. At first it was used for drilling, and afterwards for the purpose of producing oil, power purposes. It was necessary to bring in water to the Fifer tract for this development. The pump-house was

(Testimony of L. S. Landz.)

also put in for the purpose of handling oil. With reference to the Fifer tract, we pumped the oil produced on the Charles and Brown tracts, and also for the Montacal on Mr. Fifer's farm, and Tip O'Neill and all other operations which were under the river bluff or under the hill. Assuming that we had but the one lease and eliminating the Brown and Charles and others, it would have been necessary for us to have installed the pump to have handled the Fifer in the manner in which we did. There is no additional installation by [75—45] reason of other traffic going through to other places. It would require the same installation to pump 100 barrels as it would 10,000. That would be necessary for the development of the Fifer. The water installation could be a different installation; it is a high pressure pump that we use, and we could use a low pressure pump on Mr. Fifer's farm for all wells that we drilled on it. The water line installation is carried to an average depth of five feet; we laid the oil line right over the surface, but so far as the water line is concerned, it does not interfere with using the surface for farming purposes at all. The oil lines are laid on the surface and they would be just the same relative to Fifer whether we had Fifer alone or O'Neill and Brown and Charles in them. To indicate where the pipe-line comes from Fifer No. 1, Montacal-Fifer No. 1 and 2, and the other Fifer wells, how it gets down to the pumping plant, I wouldn't be positive that the lines are the same now as when

(Testimony of L. S. Landz.)

I left there in 1921, but at that time our gathering lines, we had a gravity system and we followed as near as we could down this coulee so that we could keep our line just as nearly level as possible to get gravity to the pumping station on Mr. Fifer's farm. When we gathered the oil we pumped it from there to our main pumping-plant, which I believe is on section 13, about four and one-half miles west, and from there on to Winnett, about twenty and one-half miles. The gravity line, which was placed above the surface, from the time it entered Mr. Fifer's meadow over to the pump-house, it is on land which is practically level, a part of his meadow, from the mouth of the coulee, down to the edge of the foothill above the meadow, and then where it crosses to the pump-house there, that ground is meadow. I couldn't say what part of the gathering line on the Fifer place was within the coulee. I didn't lay the lines; I didn't have charge of that branch of the work. Mr. Sontag had charge of that. The pumping station and power-house was an essential part of the development on the Fifer lease, if we had had no other, and would be [76—47] necessary to the taking of the oil out and getting it to the delivery point, and the same would be true of the water lines with this respect, we could have put in a different system of pumping water, a low pressure system to distribute over Mr. Fifer's farm, where we had a high pressure in; but the size of the line would have been the same, and it would have been buried

(Testimony of L. S. Landz.)

just the same. There is a telephone line through here also that is used in connection with the pipeline system, in case we get a line broke or a leak or anything like that, that we can stop the pumps. The telephone was not necessary to reach the wells on the Fifer land, but to the power plant, which we use in handling the oil to the main pumping station from that field. At the time we went in there first, before the stampede started, there were gates around the Fifer place, and we did not have to break the wires to get in or out. [77—48]

The roadway we entered upon and used looked like an old trail, more like an old cattle trail than a distinctly marked road. It was used all the time we were working, and I drove over the trail once before we started in company with Mr. Leavitt. The gates at either end of this field were kept closed, so far as the Franz Corporation and its operations were concerned, until the stampede came. When that happened, they were down. There were a large number of operators and a large number of people going through there at that time, but so far as the Franz operations were concerned, they were kept closed; we built them on two or three occasions. There were two gates that we went through in coming on the land originally; one located where we came on to Mr. Fifer's farm, and the other just north of our camp which we established on the Charles. The camp on the Charles tract was used for the development of the Fifer lease as well, and the so-called south gate

(Testimony of L. S. Landz.)

was the gate leading from Fifer's land to that. We also used the Weaver road which came to Mr. Fifer's house and followed the Musselshell River in a southerly direction. I drove through Mr. Fifer's corral, or rather by his corral, in using that road, and at Mr. Fifer's invitation. The first time I came through there, Mr. Fifer opened the gates. There were no other graded roads in that vicinity or any other roads used by the Franz Corporation than the ones that have been indicated, the one to the Fifer well and the one to the pump-house. It was our practice in handling heavy machinery and trucks to go in and follow defined roadways as near as possible. We did that in an effort to cut down the loss to the property owners. There were times when we were unable to follow those, in the spring of 1920 when the road was impassable from rains. At those times we probably deviated about one hundred feet away from the main roadway, getting back to the main roadway just as soon as it was possible to do so. On the map there is a line of roadway showing as wagon track that goes over southwesterly; that was first used by [78—49] the Burke Oil Company, which is now under the direction of the Franz Company, and they used it continuously for drilling a well, taking in the materials and establishing the camps. It was also used by the Williams Syndicate and Lucky Lucile. That was for drilling wells on Mr. Fifer's farm. That was the Lucky Lucile, shown on the south forty; they used practically the road

(Testimony of L. S. Landz.)

as marked on the map, this main road down and then across. That roadway was not used by the Franz or under its direction or by any of its employees. The Montacal also had two wells on the Fifer tract, in the northwest forty, offsetting the center forty on the north line. In the development of the drilling, carrying in supplies to these wells and taking oil from them, it was again the development of the Fifer lease. Taking the oil from them and furnishing the oil and water to them was through these oil-lines and water-lines heretofore designated, and through the pump station of the Franz Corporation which has been heretofore referred to.

Cross-examination by Mr. FORD.

The WITNESS.—I first went to the Cat Creek in October, 1919, and the first operations were started, moving materials on the twenty-first day of November, 1919. At that time our operations were carried on on the Charles farm. I believe we drilled three wells in this locality before starting to drill on the Fifer tract. We drilled two Charles wells, the O'Day well, and had started operations across the river, for three wells too. The work of hauling material back and forth to those six wells, three across the river and three south of the Fifer tract was not hauled through the Fifer tract. During the high water and bad roads we hauled through Mosby. It was impossible for us to cross the river until about June with the loads of material, and we had to use the bridge

(Testimony of L. S. Landz.)

at Mosby. The trail at the northwest corner that was mentioned heretofore was not really a road; it was traveled some, but it was strictly a trail. [79—50] There was also a trail to the east of Fifer's place and up through section 16. The power stations and the pipe-lines were built on Fifer's tract in 1921, in the summer. In the fall and winter of 1919 and 1920, we used wood for fuel in drilling the Franz-Charles wells.

Q. And where was it obtained from?

A. From the school section.

Mr. MARSHALL.—We object to that as immaterial. No damage claimed for wood.

Q. You also obtained some wood to the west of the Fifer tract, didn't you, Mr. Landz?

A. I don't know the exact location; Mr. Miller, I gave him a contract to furnish this wood at so much a cord at the well and he paid for the wood and hauled it to the well.

Q. Wasn't some of the wood hauled from the west of the Fifer tract?

Mr. MARSHALL.—We object to that, immaterial, because shown to be an independent contractor.

The COURT.—That might be a defense in some circumstances, but if he necessarily had to go through this land, then again the question of damage. He may answer. Overruled.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

(Testimony of L. S. Landz.)

The WITNESS.—He got this wood different places, but I don't know the location except on the school section. I know that during the time that we were drilling the Charles and O'Day wells that the fence on Mr. Fifer's land on the west end and on the south side was down in a number of places, left down for the purpose of crossing over the land, and the fence on the south side, immediately surrounding our operations on the Charles lease, was practically destroyed; that is, on the north of the Charles and south line of Mr. Fifer's tract, practically half a mile, was destroyed. At one time I had forty teams hauling material back and forth. The most [80—51] of those teams went in on this other road and came down by Mr. Fifer's house. I do not mean to say all of those teams went through the gate, and when the teamsters did go through the gates they were not always closed; we closed them and watched them and tried to keep them closed, but it was impossible to do it. During the spring when the roads were bad, we got through there the best way we could. If we could keep on the road, we did, but if it was necessary to take down a fence to get through, we did that. As I remember, the principal part of the hauling we did, when we started hauling for Mr. Fifer, was about May, and the roads were very soft at that time and we did drive through his field; we couldn't get through on the road in many instances. I remember that during the summer of 1920 Mr. Fifer had trouble with stock on

(Testimony of L. S. Landz.)

his pasture. The horses that were used by the Franz Corporation were pastured more on Mr. Charles' land than on Mr. Fifer's. Some of the horses would get over on to the Fifer land. The fence that separated the Charles tract from the Fifer land was practically destroyed, though he had a very good fence around his meadow at that time.

There were other roads leading off from this public road, the main road; we had constructed a road to drill Fifer No. 1 and Fifer No. 2, and over to the pump-house, and there was a road which lead to the camp and one which we constructed that lead up the river to Mr. O'Day's. We commenced drilling on the Franz-Fifer No. 1 well along in the spring of 1921, as I remember it. I think it was along in May or June that the Franz-Fifer No. 1 was drilled in. I don't remember what the well made when it came in. The water used for drilling the Franz-Fifer No. 1 when it was drilled, was a gravity line from the O'Day well; the pumping station was not used in connection with the pumping of water for the Franz-Fifer No. 1, for the drilling. I don't remember what the Franz-Fifer made when it was brought in; I think about a 75 barrel well, although I don't [81—52] remember exactly.

Q. Do you know what it made in settled production?

Mr. BROWN.—I object to that, "in settled production."

(Testimony of L. S. Landz.)

The COURT.—It is cross-examination; it might be material.

Exception noted.

The WITNESS.—I don't think there is any settled production in that field. The well keeps going down from the time you drill it; but the proposition, I guess, it might stop at a settled point and stay there. I don't remember how long this well made 75 barrels. I am not sure that it did, but my recollection is that when I first completed it, that the well made about 75 barrels. We commenced drilling the No. 2 well in June, I believe, of 1921. It produced two or three barrels. I wasn't there very much after that, but the well was very light to start with. The first pumping, as I remember, we got $7\frac{1}{2}$ barrels from it, but it soon settled down, and when I left they were getting two or three barrels. I believe they were getting 25 or 30 barrels from the Franz-Fifer No. 1. I don't know what it is making now. We ran a line over from the water-line which we had laid into the No. 2 Charles, to obtain the water for the purpose of drilling the Franz-Fifer No. 2. That was a gravity system, from the head flow of the O'Day well. The water from the pumping station was not used for the Franz-Fifer No. 2. It is a fact that the pumping station and the construction of the main lines for water purposes were not constructed there for the purpose of drilling wells. Had we known the production would have been as small as it is, there probably wouldn't have been

(Testimony of L. S. Landz.)

any power station built on the Fifer tract at all. I think this power station would have been constructed for the purpose of taking care of the Fifer production; we would never have built the pump had we known the wells had went off the way they do. It has been a losing proposition, so far as pumping oil, to us. I think we would have constructed this pumping station for the production of the Fifer wells alone. It [82—53] would take just as large a station to pump 100 barrels a day as it would to pump a thousand barrels a day. It is a case of pressure to shove that oil over the hill. The oil station and the water station were both built together. I don't remember which was used first. You have to have just as large equipment for the purpose of pumping oil alone as you would for both oil and water; it is exactly the same equipment for pumping water and for pumping oil; it is two engines and two pumps; one pumps oil and one pumps water; standing side by side. I don't know how long it has been since there has been any operation or drilling on the Fifer tract by the Franz people; I haven't been there for nearly two years. I left there in September 1921 and I haven't been there since. I mentioned a road being used by the Lucky Lucile and the Burke and by the Williams Syndicate, but I don't think that is all one and the same operation. Burke drilled a well right over west of Mr. Fifer's land. The Williams Syndicate drilled in the south forty of Mr. Fifer. I don't

(Testimony of L. S. Landz.)

know whether that is the same point as the Lucky Lucile or not. They change the names so often, that I don't know anything about it. The Williams Syndicate drilled south of Mr. Fifer, and I believe it was the Lucky Lucile drilled on Mr. Fifer's land. One was drilled with rotary and the other with cable tools. It might be that the well drilled with rotary was the Wharton Rose. The Lucile and Williams Syndicate may be one and the same outfit. I may have the names mixed, but I know these wells were drilled while I was there.

Redirect Examination by Mr. BROWN.

The WITNESS.—I had seven teams, fourteen horses there. We did not pay a rental or pasturage charge on those horses. The boy would turn them loose some of the nights down on the Charles farm. I did not know of their being turned loose on the Fifer tract. They weren't turned loose on the Fifer, but I know the boy has gone over on his tract to get them. [83—54]

They still use water there in the field for pumping. I don't know whether water is still being carried out to Fifer No. 1 and No. 2 and the Montacal. When we put our permanent lines in all these other lines were put in shape for winter; when we drilled the wells in summer, they were put in temporarily and afterwards put in permanently. I don't know what shape they were put in later, because I wasn't there. Water is used for pumping, after the drilling is finished, and it is

(Testimony of L. S. Landz.)

necessary to use it as long as the well is operated, and I think those wells are still being operated.

Q. You spoke about the number of teams that were hauling. What road did they use at first coming in?

Mr. FORD.—I object to that as repetition. The whole thing was gone into on direct examination.

The COURT.—I think so. The objection sustained.

The WITNESS.—I later built up and graded the public road coming from the northwest corner of the Fifer down toward the Fifer pump-house, and Mr. Fifer was there at the time and knew of it, and did not object or protest against it.

Q. Was that done to carry supplies to Fifer development?

Mr. FORD.—Objected to, repetition, leading and suggestive, improper redirect examination.

The COURT.—Sustained.

Q. Now, this hauling in, was that done by contract on a per pound basis or did you do the hauling yourself?

Mr. FORD.—Objected to, not redirect, and repetition.

The COURT.—Sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court, and offered to show it was done by independent contractor.

Recross-examination by Mr. FORD.

The WITNESS.—I said that it was necessary to use water in [84—55] operating a well after it

(Testimony of L. S. Landz.)

has been brought in. Any water that is being used on the Franz-Fifer No. 1 well to-day is being used at the Brown well, which pumps it. Water is used at some other plant which is pumping it, if it is not being used right at the wells. They use a Fairbanks-Morse oil engine, but they don't generate gas with that, but we use water in the engine cooling system.

(Witness excused.)

Testimony of L. F. Sontag, for Defendant.

Whereupon, L. F. SONTAG, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

The WITNESS.—My name is L. F. Sontag. I am superintendent of pipe-lines and production for the Franz Corporation, Mutual Oil Company and several subsidiaries. I have operated in the Cat Creek field since the 24th day of September, 1920, and have been in touch with that field ever since that time. Since January first of this year I have been there at intervals; before that, continuously.

These photograph exhibits, Nos. 3 to 15 inclusive, except No. 5, I have seen, and there have been some improvements on that since I have been there the last time. I can identify all except No. 8 as being of the same character of ground and soil and appearance as when I first knew it, and No. 8 is different from when I first knew it. On No.

(Testimony of L. F. Sontag.)

8 there seems to be more plowed ground and it seems to be in a generally better condition than at any time that I have ever seen it.

Q. What is the difference in Exhibit No. 8 that you referred to from the condition it was in when you knew it and the condition the photograph now shows it to be?

Mr. FORD.—To which we object, incompetent, irrelevant and immaterial. He says the photograph does not show the conditions that existed there prior to the damage complained of. In what the difference is is an immaterial matter. [85—56]

The COURT.—Oh, these photographs are to show the general lay of the land; there may be differences in the way of buildings and the like. I think it may be shown for whatever light it may give the jury. Objection overruled.

The WITNESS.—At the time I seen this, that is, the last time I seen this, this land was under cultivation in garden truck, vegetables of all kinds, and it was irrigated by water furnished by the Franz Corporation.

The photograph exhibits, Nos. 3, 4, 6 to 15 inclusive, of the defendant, were thereupon offered and received in evidence without objection.

The WITNESS.—I have been in the business of oil development for thirty years, in practically all fields east of the Rocky Mountains and from Ohio, not including Illinois. I have had experience and practice in the installation and equipment of similar to that which is located upon the

(Testimony of L. F. Sontag.)

Fifer land. Taking up first the use of water in connection with the drilling operations on the Fifer land, the first use of water in drilling is for steam purposes; that is, to furnish steam to run machinery and for water to put in the hole to mix the drilling so that they can be baled out. That would be water for drilling purposes. After the well is completed and you are on to production, you still continue to use water for the purpose of pumping, sometimes by steam and sometimes by power plants which are operated by rods from a central station, which is run by an internal combustion engine and has to have water to cool with, and cleaning-out operations of wells at times after they have been used for maybe a year or so and the production has dropped. I don't know where the water was obtained from for the use on the Fifer tract, but when I first came there it was obtained from the O'Day well and conveyed to the Fifer tract by the pressure of the well, which was artesian in character, at times. At that time there was a flowage, and it was not [86—57] necessary to put in a pump. That flowage from the O'Day well was interrupted on two different occasions by a cave-in in the well and caused the company to put machinery upon it and clean it out so as to make it produce. This interruption in the service and the necessity of water on the Fifer tract for drilling purposes necessitated the installation of a pumping plant to handle the water situation on the Fifer tract. It is the practice, in

(Testimony of L. F. Sontag.)

the installation of a pumping plant for water, to install that in the same building or in the same premises as the pumping for the handling of the oil production, when both oil and water can be taken at the one unit, because it minimizes the expense; the same man that pumps oil can pump the water. That was the practice followed in the installation of the pumping house on the east forty of the Fifer tract. The additional reason for the installation of this pump-house near the river was that if the water supply should cease at the O'Day well, it could be taken from the river. At one time there were other water-lines across the Fifer tract that were used by other concerns and companies other than our own. The water-lines that were put in on the Fifer tract were put in below the surface, which would have no effect on the use of the surface for agricultural purposes. In connection with the use of this water, we put in one line up to the meadow ground of Fifer's, for the reason it was asked for by a tenant of the land for water for irrigation. It was used all last summer, and is yet, as I understand, from reports, I haven't been there. That irrigation pipe leaves the tank at the pump station, at the pump-house, and goes over to a ditch that was put in by the party on the ground, along the fence there, and irrigates practically the whole garden spot. When I first went on the ground on September 23d or 24th, 1920, I observed the general contour and location of the ground in a general way. When I first went there,

(Testimony of L. F. Sontag.)

I would be there every day for a week, and then maybe miss a day or two days and then back again. My continuous [87—58] acquaintanceship with that land continued until the first day of April, 1921. When I first went there, and up until last year, you couldn't tell that there was anybody living there; I never seen anybody around the place in driving by. This place was a meadow, and a part of it was plowed and part was not. The meadow part, during the time I knew it, was surrounded by an enclosure sufficient to keep stock out. There was some hay on it, was about all I noticed. It was later used for garden truck, enough to supply all the camps in the Cat Creek field with vegetables. That is, this forty. During the time that I first knew of it, when thus growing, I never noticed any range cattle on it, outside of maybe two or three head. Mr. Fifer never made any complaint of extensive trespassing with reference to that fact. Mr. Fifer's tenant was the one who made and handled the garden. Exhibit No. 6 gives a fair sample of the character of that growth as I knew it there on the ground; the vegetation of rhubarb in the foreground.

Moving westward, the area of ground that is bounded westerly and southerly on the plat by the public highway and on the north by the north boundary of Mr. Fifer's land, that triangular tract in that area, the road runs along the edge of a slope bearing to the ditch, and in places is eight feet higher, the road is eight feet higher than

(Testimony of L. F. Sontag.)

the land thirty to forty or fifty feet from the road, and gradually slopes from the road to this ditch, and cannot be crossed by team or wagon. That brownish marking on the plat there is the ditch itself. That ditch cannot be crossed back and forth in farm or oil operations. We had to put in the so-called Fifer No. 1 road practically to the lower end of it, to where the pasture land is, within a short distance of the pasture land, and when we went that far, we had to put in a bridge to get across it. The general character of the ground is sage-brush, cactus, drift brush that has been washed down by heavy rains, and there are holes [88—59] in it maybe two or three feet deep. It is just a natural washed ditch. Exhibit No. 9 purports to be a view across the area just described, and looking westerly, and describes the ground as it was during the time I worked there. That general sage-brush and cactus formation was never broken up or taken up at any time by the owner while I was there.

In Exhibit No. 10, which purports to be a view looking up toward the wells and up this coulee or ditch, there seems to be a little more sage-brush than there was. It was never broken or cultivated or had the appearance of grass during the time that I was there. I had no acquaintance with the south forty of the Fifer tract, only to look across it. I never had any occasion in my operations to cross it. It was never used in the operations, while I was there.

(Testimony of L. F. Sontag.)

With reference to Exhibits Nos. 11 and 12, I wouldn't like to say in regard to those conditions, as conditions were of no importance to me when I was there, and in that way I paid no attention only as barren land. That resembles it to a certain extent. I would hate to say to what extent.

Q. What was the character of the ground off to the southwest? Was it meadow? Was it prairie? Was it sage-brush and cactus, or was it timber?

Mr. FORD.—To which we object as the witness has said he paid no particular attention to it.

The COURT.—He said he looked over it; if he gained any information by that he can answer. Overruled.

The WITNESS.—It looked like a common everyday sage-brush country. The character of the ground to the west of the ground in question, and along the westerly border of the two tracts, was kind of a gentle slope or rolling, and to the west, along the edges, there was cedar, little cedars on it. With reference to oil production, when a well is first brought in, the oil is gathered, by gravity if [89—60] possible; this was possible on the Fifer tract. In this gathering process, the operations are made to cover all wells that we possibly can under conditions. The first Fifer well was towards the head of the coulee, as far as the Fifer land is concerned. There were other Fifer wells in that vicinity; the Montacal-Fifer 1; the Montacal-Fifer 2 was drilled, but was not productive. When we started assembling the oil from Fifer No. 1 and

(Testimony of L. F. Sontag.)

Montacal No. 1, it was taken from those two wells to a gathering point by gravity through a two-inch line, located by the coulee. That is the same coulee that was impossible of passing until we got below it on the bridge. That pipe-line as laid there was above the surface. It was laid to keep the low places out of it, so we could get the best gravity. It was below the level of the top level of the coulee. That pipe-line would have no interference with farming operations there at all, that I could see. That pipe-line was taken from those wells to tanks at the central pumping station, which was located in the vicinity of No. 2 well. From that place the oil was taken to the main station to be delivered into Winnett. The main station was located on section 13, which is government land. The handling of this oil from these Fifer wells, down that coulee to the central pumping-plant was necessary for the development of the Franz production; we had to have a pipe-line. There has been changes in the pipe-line since I have been there; the tanks, on account of the drop in production, were made smaller and closer to the well; the connection from the pipe-lines to the tanks had to be changed so that we could get the oil. There was no change in the location of the pipe-line, nor in the size of the pipe-line, other than at the tanks. The only change was a change at the well, that is, the stock tanks from the wells were moved. On the Fifer tract the water-line and the oil-line were laid the same, relative to proximity, outside of branch lines, to

(Testimony of L. F. Sontag.)

the power plant. These oil lines that were put in to handle the Fifer production were not increased, [90—61] that is, as to their taking up more land of Mr. Fifer's, or changed in any way by virtue of the fact that oil flowed through them. They would be identical for handling the Fifer production, as though they handled several places in that vicinity. There is no increase in the character of the trespass, only from one farm to another, or one location to another. A pumping operation was necessary in the Fifer tract to get the oil produced from the Fifer tract to market. The pump installed was the size necessary for the handling of the Fifer production as it came to us. That pump is in the same location, in the same building, and working parallel with the water-pump that has been referred to. There is no great difference in the general equipment of installation for the handling of a hundred barrels or a thousand barrels.

When I first went in there, the telephone line practically followed the line and went to the camp. It has been changed since that, and leaves the line and goes direct to the pump-station by a short route. It comes from the main office and the main pump-station to this pump-station. It does not go out to the wells on the Fifer tract. The telephone line is necessary in case of breakage of pipe-lines, filling of tanks, keep them from running over, and general conditions. The telephone was necessary for the handling of the Fifer production, if we had had no other. It would have been of the same

(Testimony of L. F. Sontag.)

character of installation as it is now, and it would have been in approximately the same location. There were other roads built by the Franz people in addition to the old main highway that went across the tract, between three and four hundred feet to enable them to get to the camp maintained for the men on the Charles tract. The permanent camp for the Fifer as well as other districts, was on the Charles lease, southerly from the Fifer place. This camp on the Charles place served the workmen on the work on the Fifer lease, and the road of 200 feet came down to it. The Franz Corporation built another road there, to [91—62] get supplies and material to the Fifer No. 1 well. There was a road put in from the main road over to the pump-house, but I don't know whether it was made by the Franz Corporation. That would be used in connection with the Fifer operations, hauling material and supplies to the pump-house. I don't ever remember ever seeing that road that goes off to the southwest there on the map. I don't know whether the Franz Corporation put it in or had anything to do with it or not. It was not used by the Franz Corporation while I was there. The public highway that goes across the ground was used by other corporations and persons than the Franz Corporation, to the extent of drilling other wells and producing other wells. We produced five wells by the use of that road, or drilled them, and I think about eight or nine other wells were put in in that vicinity by other people, with the use of that same road. I think a fair estimate

(Testimony of L. F. Sontag.)

of the proportion of that main road as between the Franz Corporation and the outsiders, about five to nine. When we got under way with the production, that road had to be repaired, and it was grade up and taken care of every year by the Franz Corporation. Mr. Fifer was never there at any time when the road was being repaired or used, to my knowledge; I never saw him there.

Defendant's Exhibit No. 14 accordingly shows the main highway as it goes down and across the Fifer tract, going towards his ranch buildings and barns, and we had repaired it.

During the time that I was on this Fifer tract, it was not surrounded by a fence, that is, entirely surrounded. There was evidence there, however, of there having been a fence around the entire tract. The only two gates that I ever noticed in this fence was on the northwest corner, the entry to the Fifer place, and leaving the corner, going to the Charles place. In our use of the Fifer tract, we never broke down any of the Fifer inside fences or cross fences, to my knowledge. I couldn't say whether the inside or cross fences had any gates in them or not. The only fences that [92—63] I came in contact with were the outside ones. The fence enclosing the meadow or garden tract was a better fence than that enclosing the general tract, the last time I saw it. It had pickets sticking in it now and then, so that a person could not get through it, and the fence seemed to be in very good shape the last time I saw it. As far as I know, it entirely enclosed the inside tract. In our opera-

(Testimony of L. F. Sontag.)

tions there, the Franz Corporation never had occasion to drive across or through any of the inside fencing of this garden or meadow tract.

The only time that Mr. Fifer ever discussed with me the question of his leaving his property and going to town to live was on the street in Lewistown; Mr. Landz and I met him one time and he said he was going to leave the farm and take a rest. He did not give any other reason as to why he left it, at that time. Exhibit No. 15 correctly shows the ground as I knew it during the time that I was operating there; this is looking westerly across toward the wells of the Montacal and Fifer No. 1.

Cross-examination by Mr. FORD.

I said I came to the Cat Creek field about September 23d or 24th, 1920. At that time I was superintendent of the pipe-line, gathering the oil for delivery to Winnett. I was working in the field at that time. When I first went there, there was no production on the Fifer tract. The pipe-lines we were building were to cover the production from the Charles and Montacal. I don't believe there was any Montacal production in 1920 on the Fifer tract. I don't believe there was a pipe-line in there to handle any Charles production at that time. We put in a pipe-line afterwards, when the Charles No. 2 came in, some time during the summer or fall of 1920. They were drilling the Charles No. 2 when I came into the field. It did not come in until several months after I came; I think it came in along about June of the next year. I don't just remem-

(Testimony of L. F. Sontag.)

ber when the Montacal-Fifer No. 1 came in, but there wasn't much difference [93—64] in the time that the two wells came in, as I remember it. The production from the Charles No. 1, the discovery well, was put into tankage and sold for fuel. No pipe-line carried it out of the field, as I remember. As I remember now, the Charles No. 2, and the Franz-Fifer No. 1, and all those wells were drilled about the same time. I think the production from the Franz-Fifer No. 1 was about 65 or 70 barrels when it came in. We keep production slips, a record of the production of the various wells, but I haven't got them with me. The Fifer No. 1 was about the same as most of the wells in that field, with respect to dealing in production. I couldn't say what it was producing at the end of thirty or sixty days. At that time Mr. Landz had charge of the production and I had charge of the pipe-line. I couldn't say whether it was a very big production. We drilled the Fifer No. 1 deeper and raised the production to about twenty barrels, I think, from a barrel and a half, in June, 1922. It is not producing now; we are cleaning it out again to try to make it produce. At the time we shut down preparatory to cleaning it out, it was producing a barrel and a half, and No. 2 was producing about the same. After we shot No 2 with nitroglycerin, it produced about seven barrels for a while. That was a year ago this spring, or during the winter some time, I believe. I have no record of when we ceased the drilling operations on the Fifer tract; I couldn't say. The Franz-Fifer No. 2 well was

(Testimony of L. F. Sontag.)

brought in some time during the summer of 1921, and as far as I know there has been no drilling of any kind by the Franz Corporation on the Fifer tract of land.

With reference to the use of this pumping station, I would have put in a pumping-station of the size and capacity there to take care of the production of the Fifer tract, and I would have put in that pumping-station to take care of the 45 or 50 barrel production of the Fifer No. 1.

Q. What was the cost of that pumping-station?
[94—65]

Mr. BROWN.—We object to that as immaterial.

Mr. FORD.—I think it is immaterial.

The COURT.—He may answer. Here they have a lease. In preparation for their expected output they build their plants. I do not think because the wells don't win out or have very much oil, the fact that they have a larger plant than they now seem to justify—that is, looking backwards—would impose any liability, but he may answer. Overruled.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—This plant cost to complete in the neighborhood of maybe five thousand dollars, between five and six, which included the pipe-lines. The work on the power-station was commenced by Mr. Landz some time in August and completed by me in September, 1921. This pumping-station serves as a gravity plant. All wells can deliver their oil by gravity in that, and those wells are the

(Testimony of L. F. Sontag.)

two Wood wells, two Charles wells, two Fifer wells, one Montacal well, three Brown wells, one Golden West well and one Tip O'Neill well. The two Mosby Oil Company wells have never produced any oil. I think there are three wells on the Mosby tract now, but none of them are producing.

Q. How many wells have been drilled across the river by The Franz Corporation where the road through the Fifer tract was used in the hauling of material?

Mr. BROWN.—Objected to as not proper cross-examination.

The COURT.—I think so; you went into the question of wells across the river served by this road or over this road. Overruled.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—There was the Antelope and two Woods wells and the Jackson well, and I think two others that were drilled before I came. On the west of the river where the materials were hauled to the Fifer place, there were drilled by the Franz people the O'Day, three wells on the Charles, and two wells on Fifer. The roads were built [95—66] and established on the Fifer tract before I got there, and the drilling operations on the Fifer tract was commenced in 1921.

The Franz Corporation furnished the pipe for the purpose of getting the water to the tract of land that this man living on Fifer's place at the present time asked for for irrigation purposes. We did not offer it to him; he took the water, but he said he

(Testimony of L. F. Sontag.)

was not getting enough, and then we laid the line and gave it to him, because we wanted him to raise vegetables for the camp. I don't know whether that was after the suit brought by Mr. Fifer or not. It was early last summer some time that we made the agreement and laid the pipe-line to furnish this water to raise the vegetables on the Fifer tract with. As far as I know we are still furnishing the water for that little tract. I heard the old man say he was fixing up his fence around the little garden there last year. There was more acreage than 2.95 acres in that little patch there last summer where he raised his watermelons and beans. It may be that now, according to that map, but there was more than that there last summer. I do not mean to say that during the time that I was there, from September 24, 1920, that these fences were all intact; that is, the outside fences. As far as I know, the inside fences were. I have seen a cow now and then on the inside of the Fifer tract. The Franz horses were not turned out after I took charge of the property; hay and feed was bought, and they were fed in the corral and barn. I took charge of production in September, 1922. At the time Mr. Landz was in charge there, I never seen the Franz horses ranging on Mr. Fifer's meadows or fields. They were always busy working when I was down on the job. I have never seen that south forty under cultivation; it looked just like sage-brush and open prairie to me. I never paid any particular attention to see whether any part of it was cultivated or not; just casually looked across it. I

(Testimony of L. F. Sontag.)

never did see any evidence of posts setting there during the time that Mr. Landz was in charge of the operations, [96—67] between the river and this corner that was practically destroyed, the point marked "11" on the map.

I want this jury to understand that with all of the operations being carried on there by the Franz Corporation, that none of the outside fences were torn down by teamsters, or driven across and destroyed, only at the entrance and outlet that we had. The fences might have been crossed at other places, on occasions, like getting to Fifer No. 1. Outside of the entrance and the outlet, in the operations conducted by the Franz Corporation, there was no occasion to tear down any fences; I don't know that they did. When I went there in 1920, the tract of land shown in the photograph, marked Exhibit No. 8, was in some kind of hay, timothy or blue joint, and now a majority of it is being used for garden purposes.

Redirect Examination by Mr. BROWN.

The WITNESS.—In my oil experience and in the location of similar pumping-plants and pipe-lines, I have had occasion to buy and rent the right to put in similar installation to that we have on the Fifer tract.

Q. In the oil trade and in your experience what has been the average price that you have paid for a similar privilege of installation?

Mr. FORD.—To which we object as being incom-

(Testimony of L. F. Sontag.)

petent, irrelevant and immaterial. There is nothing to show that the same conditions prevailed.

Mr. BROWN.—Withdraw the question.

Q. Have you had occasion to rent the surface-right privileges for use similar to what you have here under substantially similar conditions as are in existence on the Fifer tract?

Mr. FORD.—To which we object for the same reason; different locality.

The COURT.—Yes, conditions may differ wherever lands are separated by any particular distance.
[97—68]

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Mr. BROWN.—I believe I am entitled to show from a witness whether or not he has purchased under substantially similar conditions; whether or not he has or has not is for him to determine.

The COURT.—You are asking for a conclusion in the first place. Objection sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?

Mr. FORD.—Same objection.

The COURT.—What are you contending for?

Mr. FORD.—We are suing for damage to the crop and damage to the premises.

The COURT.—Yes. I see; they are not suing

(Testimony of L. F. Sontag.)

for use and occupation, suing for damages. Objection sustained.

Mr. BROWN.—We would like permission to make a written offer of proof later.

The COURT.—You may.

The WITNESS.—I said the pipe-line, for the irrigation of that little garden, was put in last summer, some time early in June, I believe.

DEFENDANT'S WRITTEN OFFER OF PROOF.

We offer to prove by the witness on the stand, L. F. Sontag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Franz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Franz Corporation is making of these lands is one hundred dollars per year.

Mr. FORD.—To which the plaintiff objects on the ground that the [98—69] witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

The COURT.—The offer is denied and exception may be noted.

(Witness excused.)

Testimony of David Hilger, for Defendant.

Whereupon, DAVID HILGER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MARSHALL.

My name is David Hilger. I reside at Lewistown, Montana; I have resided in Fergus County for about forty-two years. The Cat Creek oil fields are located in Fergus County. During the time I have resided in Fergus County, I have been in the livestock business, ranching; I was register of the United States Land Office there for four years, from 1894, and then I was in the general land office practice and loan business for quite a number of years; probably ten or twelve years. I was also in the real estate business in that county. I am interested in a ranch on Flat Willow Creek, about 3,500 acres, of which practically 1,000 is under irrigation. I have been engaged in the livestock business, and farming business, both irrigated and dry, on this ranch, and am so engaged at the present time.

I think I know where the Fifer ranch is located on the Musselshell River, from the descriptions and plats that I have seen. I have been to the Charles well in Fergus County; I made quite a number of trips down there to that section in 1920, 1921 and 1922. I know where section 16 and the Charles tract is located, and I know the land in question lies between that; I have been over the land. I

(Testimony of David Hilger.)

think I am familiar with the values of eastern Fergus County land, also familiar with the value of pasturage lands and irrigated lands. [99—70] The general nature of the lands along the Mussel-shell River and particularly these lands as you go down into the bottom lands, it is getting pretty well down into the breaks, it is pretty rough; the bottom is not very wide, and there's bad land breaks coming in on either side along there.

Basing my opinion upon my experience of 42 years in Fergus County as an irrigation farmer and a dry-land farmer, and upon my experience as Register of the United States Land Office, and in the real estate business, in my opinion, 120 acres of this land in the breaks of the Mussel-shell river, particularly the land in question, for farming and stock-raising purposes, during 1919 and 1920, would be worth, the irrigated land under a permanent water supply on those bottoms, I would put the maximum value at about \$50.00 an acre. That would be dependent upon a permanent, reliable water supply. The grazing lands are not a great deal of value, probably—basing it on rental values where I am located about 25 miles from there, for state lands we pay \$100.00 a section of 640 acres. That would be about what we pay for grazing values; I have rented other lands around there; we have never exceeded the value of \$100.00 a section for grazing purposes. That would be something like 15 or 20 cents an acre. If the testimony shows that the water supply on this

(Testimony of David Hilger.)

tract is from the coulee, dependent upon one or two small springs and the winter snows and spring rains, in my opinion it would not be as valuable, the irrigated lands, as where it was located under the permanent ditch. It would be of less value than \$50.00 an acre. A water right out of a coulee that only runs when the snow goes off or during the heavy rains would certainly be of less value.

In my opinion, basing it upon my experience, the construction of highways and telephone poles and water-lines which are buried, and oil-lines which are on the surface, would not alter the value of the grazing land, on land of the character described unless it [100—71] had a tendency to throw it open to the public.

Q. Mr. Hilger, in your opinion, taking a 160-acre stock ranch and farming ranch, as the evidence shows it varies from 20 acres to 40 acres of land that can be plowed or meadow land, surrounded on the north by a school section which is not controlled by the owner, surrounded on the north and west by patented land and on the south by patented land, in other words, a secluded 160 acres, to the very extreme we will say about 50 acres that is susceptible of being farmed and the balance grazing land, what, in your opinion, would be the reasonable rental value of that piece for one year, or 1920, 1921 and 1922, for stock-growing purposes and general farming purposes?

Mr. FORD.—To which we object as being based upon a condition that is not shown by the evidence,

(Testimony of David Hilger.)

namely, there is no testimony that the land to the west is deeded land, the testimony shows that there is an excess of 50 acres of cultivated land upon the premises.

The COURT.—I think you have restricted the cultivated or meadow land below what the evidence justified. The objections will be sustained to the question.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Q. Referring to the land in question, the E. J. Fifer land, as you know it, located on the Mussel-shell river, assuming that 60 acres of it is capable of being farmed and the balance is grazing land, what, in your opinion, would be a reasonable rental value per year for that 160 acres as a stock-raising and as a farming ranch? [101—72]

The WITNESS.—I would say not to exceed \$500.00; about \$400.00 would be the rental value for stock ranches that is largely used for grazing and raising some hay for stock purposes. On the basis of \$20.00 an acre, \$3,200.00 that would be for ten per cent, I would say \$400.00 that would be the actual cash value per year, covering the years 1919, 1920, 1921, and 1922, as a general renting proposition.

Cross-examination by Mr. FORD.

When I put the value of \$3,200.00 on this land, I am placing that value upon some experience I had recently on my own ranch of a loan basis made by the Federal Farm Loan Bank and other par-

(Testimony of David Hilger.)

ties, giving the value of similar irrigated lands. Fifty dollars an acre is the limit that they will place as a value on irrigated lands. They put that value on as actual cash value of the land, and the loan purpose is not to exceed fifty per cent of that, or about forty per cent. The \$50.00 an acre for irrigated land by the Federal Reserve Bank is a value that is placed upon it for loaning purposes. For loaning purposes it is the disposition of the loan companies and the Federal Loan Board, to place an under value upon the property; that is, irrigated land, with reference to loan values, these under values; they are supposed to place an actual cash value upon it, but it is true it is undervalued for loan purposes. Generally speaking, the values for loan purposes is supposed to be considerably less than the real and market value of the land, but it has not resulted so in actual experience, in my observation. My observation has been that the value for loaning purposes has been too high. I won't say so much about irrigated land. Irrigated lands maintain their values a great deal better than dry lands. In placing the value upon the Fifer tract of land, I take into consideration the value that the Federal Loan Board placed upon my land, situated some thirty-five miles from [102—73] the Fifer tract, to some extent. Well, I also take into consideration the fact that it is quite a ways from market, and Winnett is the nearest point of market. It is a stock ranch, and hay that would be raised there would naturally have to be con-

(Testimony of David Hilger.)

sumed by stock that you put on that place, and the distances from marketing point is a considerable difference in irrigated land. In times gone by, the fact that a tract of land was located far from a railroad in a stock-raising country and when you had access to the public lands, worked to the advantage of the owner of the property. I think that that is a very good stock country, and an accessible ranch would have a tendency to increase the value of bottom land that produced hay. There is no question about it.

Q. I say, we will assume that this 40 acre tract will produce from 30 to 45 tons of blue-joint hay, that the reasonable market value at that point is \$25.00 to \$30.00 a ton, then Mr. Hilger, what would be your judgment as to the value of the Fifer tract of land?

Mr. MARSHALL.—We object to that, assuming a state of facts not shown by the evidence. It is not 40 acres.

The COURT.—How many acres did you state?

Mr. FORD.—I said 40-acre tract.

The COURT.—I don't think you have it; I think all your witnesses show less.

Q. Mr. Hilger, assuming that the tract of the Fifer land in the east forty west of the river, approximately 30 acres, would produce from 30 to 45 tons of blue-joint hay per season and that the reasonable market value of that hay was from \$25.00 to \$30.00 a ton, with that assumption what then

(Testimony of David Hilger.)

would you say would be the reasonable value of the Fifer tract of land?

Mr. MARSHALL.—We object to that as assuming a state of facts not shown to exist, as there is no thirty dollar a ton hay on the particular forty. Thirty dollar hay was confined to the [103—74] clover forties.

The COURT.—Oh, no. Answer the question.

Exception noted.

The WITNESS.—I would consider it to be of more value if it produced that much hay, yes. If the total production from that five or six-acre tract to the east of the river were three tons of alfalfa hay per acre per year, and the reasonable market value of that hay in that vicinity was from fifteen to twenty dollars per ton, that would increase its value over the value that I would put upon the Fifer tract.

Q. Assuming that thirty acres of the Fifer tract was seeded to clover, thirty acres in the south forty, was seeded to clover, a sweet clover that would yield from one to one and a half tons per year per acre, and that the reasonable market value of that sweet clover was from \$15.00 to \$20.00 per ton, what then would you say? What effect would that have upon the value?

A. It would increase the value of the land.

Mr. MARSHALL.—That is assuming a state of facts not shown by the evidence.

The COURT.—Overruled.

(Testimony of David Hilger.)

Whereupon the defendant then and there duly excepted to the ruling of the Court.

Q. Now, assuming that the Fifer tract is capable of producing from 30 to 45 tons of blue-joint hay per year of the reasonable value of from \$25.00 to \$30.00 per ton, that six acres across the river is capable of producing 15 to 18 tons of alfalfa hay of the reasonable value of \$15.00 per ton, that thirty acres in the south forty is capable of producing 30 to 45 tons of sweet clover of the reasonable value of from \$15.00 to \$25.00 per ton, then what would you say would be the reasonable market value of the Fifer tract per acre? •

Mr. MARSHALL.—Same objection.

The COURT.—Overruled. [104—75]

Whereupon the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—Well, it would materially increase its value, probably \$30.00 an acre, might possibly \$40.00; with these conditions and that value for hay. I spoke too of land for grazing purposes, that I had paid \$100.00 a section for leased land; that is not under cultivation. That is grazing land strictly. The fact that 60 to 65 acres of the Fifer tract is in sweet clover and blue-joint hay and alfalfa hay would increase the value of that for pasturage purposes, after the harvesting of the crop. As a matter of fact, if there is that much land in clover and blue-joint and alfalfa, I don't know whether \$100.00 to \$150.00 a year would be a reasonable value to place upon the pasturage

(Testimony of David Hilger.)

upon that place. We feel in paying \$100.00 a section for much better grass land than that, that we are paying a pretty high price, and more than we are justified to by the stock business. After you cut your hay in the summer, there is a considerable growth that makes very good pasture for stock purposes; not so much of blue-joint, but there is with the alfalfa. I have had no experience with clover; I couldn't say about that, but I think it would. Taking those things into consideration I would think it would be worth \$100.00 to \$150.00 a year for the value of that place for pasturage purposes.

Redirect Examination by Mr. MARSHALL.

I know the value of alfalfa hay during the years of 1920, 1921 and 1922, in this immediate vicinity.

Q. How much was it a ton in the vicinity of your ranch, which was thirty miles distant?

A. You mean the value of hay up at the ranch I am interested in?

Q. Yes.

Mr. FORD.—We object to that. His ranch is located 30 to 35 miles distant from the land in question and an agricultural and irrigated country.
[105—76]

Mr. MARSHALL.—The same distance that Winnett is from this ranch, a trading point.

The COURT.—You have to take into consideration the peculiar situation of this land, way off from the railroad; if there was any market at all, it might be worth more there than at the railroad;

(Testimony of David Hilger.)

it depends upon circumstances altogether as to what the value of hay would be. I don't think a mere general market in the centers of trade or of a hay exchange would be a fair test. The objection to the question will be sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

My ranch is located about 24 miles from Winnett and about 26 miles from Roundup, both railroad points. My ranch is located in a general stock-raising section of Fergus County, and I guess it is about probably twenty or twenty-five miles straight across the country from this particular land. My land is located on Flatwillow Creek, in a similar vicinity where hay is purchased when it is needed, and sold right there at the premises and not hauled to market.

Q. How much under those conditions was hay worth in that vicinity? What was the market value during the years 1920, 1921 and 1922?

The WITNESS.—This year we have a lot of alfalfa that we can't sell at all, from last year's growth. We sold a lot of hay there at different times from six dollars a ton to ten dollars; [106—77] alfalfa hay, in the fall of 1919, we sold it for higher value on account of the general very scarce hay conditions in that country at that time; in 1920, 1921 and 1922, we sold it at \$10.00 a ton, is the most we got, and last year's crop we haven't been able to sell at all.

(Testimony of David Hilger.)

Recross-examination by Mr. FORD.

The WITNESS.—My ranch down on Flatwillow Creek is located in an irrigated district. There are approximately 1000 acres of my land under irrigation there, and I raise principally alfalfa upon that irrigated land. There are a number of ranches up and down the creek that irrigate more or less. I think we probably irrigate a little more than the other ranches adjoining us above or below. There may possibly be as high as four or five thousand acres up and down the creek, within the vicinity, within a reasonable distance, that is irrigated. The stockmen down in our vicinity raise the feed that they need for their own purposes. We run stock and feed it, but in our experience we have always put in a good deal more hay than we consumed ourselves, and sell that if we can. All the stockmen in that vicinity aim to carry stock enough to consume the feed, if possible, and they don't intend to carry more stock than they have feed to take care of it.

Witness excused.

Testimony of Walter O. Downing, for Defendant.

Whereupon, WALTER O. DOWNING, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MARSHALL.

My name is Walter O. Downing. I reside at Lewistown, Fergus County, Montana, and have been a resident of Fergus County since 1882. Dur-

(Testimony of Walter O. Downing.)

ing that time I have been engaged in stock-raising, farming, real estate and loans. My stock-raising and farming business has been carried on all over Fergus and Judith Basin Counties. I have been engaged in real estate since 1912. During that time I have been engaged, I have been called upon to go to [107—78] *go to* different sections of Fergus County for the purpose of making investigations of lands. I am familiar with the E. J. Fifer ranch on the Musselshell River, approximately thirty miles east of Winnett, and have been familiar with it for something over two years. I have had experience in making investigations for the purpose of ascertaining values, for loan companies and for the County Commissioners of Fergus County.

Q. Assuming the Fifer ranch to be composed of 160 acres of land running in an L-shape, the east forty acres having the amount of agricultural land as is shown by this plat, and the south or extreme southern forty having 25 to 30 acres that is capable of being farmed, what, in your opinion, is that ranch worth as a stock-raising and an agricultural ranch?

A. At the present time?

Q. Yes, at the present time?

Mr. FORD.—Objected to as incompetent, irrelevant and immaterial; the value is not now.

The COURT.—Sustained.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

(Testimony of Walter O. Downing.)

Q. What, in your opinion, would that land be worth during the year 1919?

Mr. FORD.—Objected to as being prior to the time of the damage complained of.

The COURT.—The objection is overruled. Answer the question.

The WITNESS.—I would say between fifteen and twenty dollars an acre at that time.

Q. Would you consider that the value of the land was reduced to any considerable degree by reason of the fact that two oil wells have been drilled upon the grazing land and oil-lines and pipe-lines and telephone lines have been placed across the grazing land and across the agricultural lands? [108—79]

Mr. FORD.—I object to that as assuming a state of facts not shown by the evidence.

The COURT.—The question would seem on the theory on the part of both parties. The objection will be sustained.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

The WITNESS.—The fact that this particular land is covered by pipe-lines, telephone lines, oil-lines, as shown on the map, in my opinion, that would not decrease the value of this particular ranch at all, from the standpoint of a stock-raising and agricultural ranch, so far as the pipe-lines go on the agricultural land. In my opinion, basing it upon the experience of farming in Fergus County, and being in the real estate business there,

(Testimony of Walter O. Downing.)

I would say about \$250.00 a year would be the reasonable rental value of the Fifer ranch.

Cross-examination by Mr. FORD.

The WITNESS.—That is based upon what I consider the value of the agricultural land is worth per acre from rental value and of the pasture land. I have seen this particular land probably thirty times, last year, and the year before a great many times. I don't know what the land was producing prior to 1921; not as particularly as I did in 1921. I was down there in 1920 two or three or four times. I didn't see many crops growing on that place. There were some; there wasn't very much in evidence in crops at that time. I would be surprised if you were to tell me that the evidence shows that from this tract west of the river, on the east forty, forty-five tons of blue-joint was produced, because I did not see the stacks. I said I was engaged in the real estate and loan business. In fixing the value of this piece at \$20.00 per acre, I took into consideration the loan value, all the different ways that I have of figuring out the values of land, through loan values, through their accessibility, through their [109—80] opportunity to deliver stuff from that to any market, the character of soil, and so forth. I didn't see any irrigation system on this place when I was down there. If you just figure your irrigation from the spring freshets and from springs that are there, it wouldn't change my opinion much, I would have to see it first. If it is a fact that this tract is

(Testimony of Walter O. Downing.)

watered one or two times a year from spring freshets and melting snow, I would say it would increase the value of the land, possibly.

Assuming that this land is capable of producing thirty to forty-five tons of blue-joint hay and that the reasonable market value of the hay so produced was \$25.00 to \$30.00 a ton, if that were all so. That would change my idea of the value of that tract of land. Assuming that you had six acres of alfalfa east of the river that was capable of producing fifteen to eighteen tons of alfalfa a year and that the reasonable market *market* value of that alfalfa in that vicinity was from \$15.00 to \$20.00 per ton, that would in my opinion increase the value of this land.

Assuming that thirty acres of the south forty is in sweet clover and that the clover is capable of producing from thirty to forty-five tons per year, that the reasonable market value in that vicinity is from \$15.00 to \$20.00 a ton, if that were true, in my opinion, it would increase the value of that land.

Assuming that the six acre tract across the river was capable of producing fifteen to eighteen tons of the reasonable market value of \$15.00 to \$20.00 per ton; that the meadow across the river was capable of producing 39 to 45 tons of blue-joint of a reasonable market value of from \$25.00 to \$30.00 a ton; that the thirty acres of sweet clover was capable of producing 30 to 45 tons of the reasonable market value of from \$15.00 to \$20.00

(Testimony of Walter O. Downing.)

per ton, I would say the reasonable value of the Fifer tract of land would be about \$4,500.00. [110—81]

Redirect Examination by Mr. MARSHALL.

Q. From your knowledge and from your number of visits that you have made there, are these assumptions real or mythical, as given you by Mr. Ford?

Mr. FORD.—To which we object as being incompetent, irrelevant and immaterial.

The COURT.—It is for the jury to say.

Whereupon, the defendant then and there duly excepted to the ruling of the Court.

Witness excused.

REBUTTAL FOR THE PLAINTIFF.

Testimony of E. J. Fifer, for Plaintiff (Recalled in Rebuttal).

Whereupon, E. J. FIFER, the plaintiff herein, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination by Mr. FORD.

I heard the testimony of Mr. Landz and Mr. Sontag with reference to my not having complained or protested against the tearing down of my fences and the use of my land in the manner as has been described, and I wish to say that the facts are that I certainly did complain to Mr. Silas Green Sodder, foreman of the roustabout and pipe-lines, and had charge of the teams, in 1920. He said, "They will

(Testimony of E. J. Fifer.)

make it right with you; I am sure Mr. Kelly is a fair man and am sure he will make everything right with you." I heard the testimony of Mr. Sontag to the effect that he and Mr. Landz met me on the streets of Lewistown, that I told them that I was giving up the farm and going to take a rest, but to my knowledge I did not make a statement in that form.

Cross-examination by Mr. MARSHALL.

I did not make that statement in any other form, not that I know of; in no form that I can recall to mind.

Q. Did you say—you did not say to Mr. Sontag, "I am leaving the place down there"?

A. I am sure I quit.

Q. I beg pardon? A. Yes, sir. [111—82]

Witness excused.

The plaintiff rests.

Mr. BROWN.—Comes now the defendant and moves the Court at the close of the case to direct the jury to find a verdict in favor of the defendant, on the ground and for the reasons:

1. That the complaint does not state facts sufficient to entitle the cause to be submitted to the jury.

2. The proof is wholly insufficient to prove the allegations of the complaint or any damages to the plaintiff or that he is entitled to any damage, the proof shows that whatever use and occupation was had of the premises by permission and under contractual relation that gave express authority for

such, and there is a total failure to prove any damage other than damage which is expressly authorized or would be *damnum absque injuria*.

3. There is confusion in the proof to such an extent that the plaintiff has failed to prove his case. It cannot be determined whether or not the damages of plaintiff were due to causes for which the defendant might be responsible or due to the acts of third parties, or due to causes that are expressly relieved from in the lease agreement, and there is no sufficient proof of the causes being from the defendant or upon his responsibility to entitle the case to be submitted to the jury.

We submit that without argument.

The COURT.—Does counsel for plaintiff want to submit a like motion?

Mr. CHOATE.—If it please the Court, at close of the evidence of plaintiff moves the Court to instruct the jury to return a verdict for the plaintiff upon the proof submitted in the sum of ten thousand dollars.

The COURT.—The Court will deny the defendant's motion and will grant the plaintiff's to the extent of directing the jury to return a verdict in favor of the plaintiff, but will leave to [112—83] the jury the amount, which parties will argue to the jury.

Whereupon the defendant then and there duly excepted to the ruling of the Court.

There is no question that the evidence shows some destruction of fences that are imputable to the defendant, more than is warranted by the lease.

I find nothing in the lease that will warrant destruction of the fences; in fact, the lease expressly provides the defendant will pay any damages to fences and also to crops. Undoubtedly the defendant and plaintiff agree that the [113—83½] defendant might go in and do anything upon the land in the way of drilling for oil, taking it out, building structures for that purpose, pipe-lines and the like, in so far as reasonably necessary to discover and make use of that oil in plaintiff's land; but equally there is no question that the lease does not authorize the defendant to go in and use these premises as a basis for operations on other lands than the plaintiff's, and if it did—and there is evidence that it did—and if that added to the damage that the land suffered by reason of those operations, of course, to that extent the defendant would be liable.

The Court will rule, however, when it comes to the instructions, that so far as any damage was done to the land by the mere drilling operations on this land, and in so far as injury was done to the land by structures for this land, that, in legal contemplation, is not a damage, that is the very thing the parties provided should be done. That is different than the temporary injuries to crops and fences, for which the lease expressly provided. There is a clause in the lease that the defendant will pay for any damage to fences and to crops or for damage upon said premises, but I cannot believe that these parties by "other damage" meant the ordinary results of drilling and pumping oil out of this land and building structures for that purpose.

So that will be the ruling of the Court and the parties may proceed knowing just about what I will instruct the jury. As I see it, there is nothing left but the amount that is due the plaintiff.

Whereupon, respective counsel made closing arguments to the jury.

Instructions of the Court to the Jury.

Gentlemen of the Jury: In this case, as in all others, you have heard the evidence and the argument and now it is for the [114—84] Court to deliver to you the instructions or charge, generally to make you acquainted with the law, which, as you know, you take from the Court, though on occasion it may extend to comment upon the evidence. While you take the law from the Court, of course, as you well know, you determine the facts for yourself from the evidence and circumstances in proof before you.

In this case, as in all others, the complaint, upon which the plaintiff founds its cause of action, is not itself evidence against the defendant, nor in behalf of the plaintiff. This is what is termed a civil action, an action between two private parties, the Government not having any interest in the case except to afford the machinery through you and myself to get justice between these two contending parties. The difference between a civil action, like this, and a criminal action is that whereas in a criminal action the proof must go to the guilt beyond a reasonable doubt, that is to say, the party having the burden must prove its case beyond a

reasonable doubt, but in this case the party who must prove his case it suffices if he furnishes to you the greater weight of the evidence, which, as you will observe, is not as high a degree of proof as to prove a thing beyond a reasonable doubt. In a civil action you may consider that you had a scales before you with the evidence of each party in one or the other balance hands, and in that case, if the evidence of the plaintiff outweighs the evidence in behalf of the defendant upon any disputed point the plaintiff is entitled to recover as proving his case by the greater weight of the evidence.

The rules in respect to credibility of witnesses and the weight to be given to evidence and how you determine the truthfulness of witnesses and the like are the same in this variety of case as in a criminal case, and you have been told those rules so many times that I imagine you can almost lecture on them, and the [115—85] Court does not need to go over them again.

This case, after all, is very simple. The plaintiff is entitled to recover, and the only question is how much; though, of course, when you come to determine how much it may not be quite as simple as at first blush it seems to the Court in saying so. The plaintiff is entitled to recover whatever will compensate him for any injuries that the defendant has done to the plaintiff's crops which include the entire crop or pasturage, any damages or injuries that the defendant may have done to the plaintiff's fences on the land, and any damages that the defendant may have done to the land itself, other

than those that followed from its development of oil upon this particular land itself.

The plaintiff had title to the land involved in this case—not at all material how he had acquired it—but the fact that he owned the title is the material portion, and of course the character and value of the land before that was injured. They are in possession. The defendant's predecessor in interest, one Franz, came along, and he and the plaintiff entered into a contract, a lease, wherein the plaintiff leases this land to Franz for the purpose of developing and taking from it any of the oil that might be found in it, and in order that that might be done—and it was for the benefit of both parties, because the plaintiff was to get a portion of the oil,—in order that that would be done the lease provided that Franz might drill wells and place thereon necessary structure for the purpose of finding the oil, of producing it and saving it and transporting it off the premises. This inevitably would involve entry on the land by Franz or his successor, the defendant in this action, and the drilling of wells, the passing over the land, carrying on of materials and supplies, and the erection of certain structures, like derricks and pipe-lines to transport it off the land and to the main pipe-line, telephone lines and the like. In addition [116—86] to that, the lease provides that the defendant will pay to the plaintiff any damages, for any damages that the defendant may inflict upon the plaintiff's crops or upon the plaintiff's fences or any other damage. As the Court and the law construes the lease, this

would compel the defendant to pay for any damage to crops and fences, no matter whether necessarily inflicted in attempting to find and dig oil from this land or not, but it does not compel the defendant to pay for any injury to the land consequent upon reasonable pursuit in this land of the oil that was supposed to be there, and any reasonable buildings and derricks, a pumping-plant, pipe-lines, telephones and the like for the purpose of taking the oil out of this particular land. No one could call that—the results of those operations—damages, and the party did not have that in mind. They were contracting that he should actually come in and do that variety of work, Franz, for the benefit of them both. But while this lease justified the defendant, as the successor of Franz, in erecting upon this land any reasonably necessary structures for finding and taking of oil out of this land, and that would include all such roads as were reasonably necessary, any pipe-lines reasonably necessary, pumping-plant and telephone, it wouldn't justify the defendant in making this land the basis of operations upon surrounding lands that the defendant was engaged in taking oil from; and if the defendant did make use of this land as a basis of these operations elsewhere, and if by reason of that fact it inflicted greater injury upon the land than was the natural consequence of its operations upon this land, why, for that excess injury it would be liable to the plaintiff as any other trespasser would have been. It is not a matter of contract so far as those damages would be concerned because the contract did not provide that the defendant might inflict

any such variety of injury upon the land. [117—87]

In determining the amount of damages in respect to these various items you are to allow the plaintiff nothing but what is fair and reasonable compensation. The defendant is not to be punished or mulcted more than the plaintiff has suffered. The damages are entirely compensatory. In considering the amount of compensation that the plaintiff will be entitled to, taking first the crops, namely, the hay, any other crop, including his pasturage, if any, that plaintiff will be entitled to what would be the—not market value of those crops as his damage; he wouldn't be entitled to the full value of the crop you see, because in any event to make those crops would cost the plaintiff something, and in so far as he did not expend that cost in making the crops. If I remember right, I think that is the plaintiff's theory, unless perhaps some expended in the second year—why, he is only entitled to the net value of them. Of course, any crops that were lost, the plaintiff would be at no expense for harvesting them, and that would be deducted from the market value of the crops.

The pasturage, if the land had any value for pasturage, and if the defendant destroyed that value, rendered the plaintiff unable to secure it for any particular year, the defendant would be liable for that also. But remember that the defendant is only liable for the damages that it inflicted upon the plaintiff. Of course, however, if it is responsible for the destruction of the fences, so that

strange stock and range stock pastured on the land, in addition to some pastured by the defendant's own stock, why, the defendant is liable for the full value of the crops destroyed, because if it destroys the fences and with reasonable effort the plaintiff couldn't keep them up, the defendant was bound to understand that strange stock would go in and destroy the crops, as the plaintiff insists was done.

In the matter of fences, the defendant bound itself to pay [118—88] for any fences injured; and, again, it is only liable for the fences that it injured and destroyed; it wouldn't be liable for the fences that strangers destroyed, if there were any destruction of that nature. It is to be said that the evidence is not very clear in respect to any of these matters, but you are to arrive at the best solution possible in view of its nature. The plaintiff does say that the fences were practically destroyed about 1921 and thereafter; some destruction before 1920; he tells of the defendant's teamsters taking them down and leaving them down, in some instances taking the wires down at the bottom of the posts, passing over, and then the wagons or chains catching, dragging and destroying more of the fence than where the teamsters actually drove through. Of course, the defendant is liable for any action of any of its teamsters in that respect. And in respect to the fences, in so far as you find the defendant responsible for their injury or destruction, the rule of damages is the reasonable cost that the plaintiff would be put to in replacing

those fences, and in so far as he made reasonable effort to maintain them while the destruction was going on he would be entitled to the reasonable value of his services and expenditures in thus endeavoring to maintain them.

When we come to the land, then this is the situation in respect to that: It does appear that roads were built upon the land by the defendant, and it claims that those roads were necessary for the development of the oil within the plaintiff's lands. The plaintiff says no, these roads were really built before there was any oil development on this land, built to enable the defendant to develop other lands and were unnecessary for the plaintiff's lands. So with the pipe-lines and the pumping plant. The plaintiff insists that they were more extensive and larger than would have been necessary for a reasonable development of its lands. You may remember, [119—89] however, that when this lease was entered into and the defendant proceeded to explore the land for oil, or getting ready for it, no doubt both parties did not anticipate that the production would be as small as it was up to the present time, and—I think the lease still continues—there may be future development. If the defendant overbuilt its plant, yet if it built it in good faith for the development of this land, it is not responsible because it now turns out that the plant is larger than the necessities of the land so far appear to justify. Another thing, if it did build a larger plant than is necessary in the way of pipe-lines, oil and water, and pumping plant, that alone

does not make the defendant liable for more than nominal damages unless they increase the burden upon the land, increase the injury to the land. For instance, let it be assumed that the defendant consciously built a pumping plant intended to serve surrounding territory as well as this land and larger than it would have built for this land alone, if the larger plant does not injure the land any more than a smaller plant would injure the land, then the plaintiff is not entitled to any substantial damages merely because the defendant built it too large for this land. In other words, there must be damage before the acts of the defendant can confer upon the plaintiff a right to collect damages. So with pipelines and other instrumentalities.

As before stated by the Court, any damage to the land itself, due to the defendant's operations upon this land by virtue of the lease, was not within the contemplation of the parties that the defendant would pay for them. They expected that some injury, occupation of the land would follow the contract between them at least, but any damages, if you can find any, to the land that are due to the defendant's operations in the surrounding territory, that would not have been inflicted but for the defendant's operations in the surrounding territory, you are [120—90] directed to allow those to the plaintiff, as he is entitled to them.

Now, when you come to determine the damage to land, the rule of damages laid down by the law is this: In order to arrive at what the land has suffered from a monetary standpoint you take the

value of the land before the injury was done to it and the value of the land after the injury was done to it, and the difference, if any, will be the money value of the damages that have been inflicted. For instance, if you should find that this land was worth five thousand—simply taking that as an illustration—five thousand dollars before the defendant operated upon it and did the things upon it that it is contended it did, and if you find that the land is now worth let us say two thousand dollars—only for illustration—the damages to the land would be the difference between five and two, or three thousand dollars. But that is not all; then it would be for you to determine how much of that is an excess due to the operations of the defendant on the surrounding territory instead of upon the land of the plaintiff itself. If the damages would be as great from the operations of the defendant upon the land itself as they are in connection with the operations of the defendant on the outlying lands, then the defendant's operations in contemplation of law haven't injured the plaintiff at all and he wouldn't be entitled to anything for that; but it is for you to say whether the outlying operations added to the damage on the land and, if so, how much.

Now, there is some evidence, gentlemen of the jury, that in the course of the operations on this land the plaintiff virtually got up and walked off. His testimony is that he found it impossible, reasonably impossible, by any reasonable effort to keep up the fences, and hence he couldn't accomplish

any thing and he left the land. Now, the law is that if one person does [121—91] something that injures another, tears down a fence, the person whose fence has been torn down cannot simply leave it lie down and all the cattle in the country destroy his crops, and expect to get the full value of the crops destroyed. He must make reasonable effort to avoid the damage by putting up his fence again. But if he makes that effort and the fence is taken down again and he employs himself reasonably to keep it up and find that he cannot, then the law will justify him to walk off and leave it as the party who is tearing down the fence has put it, and it is that party then who is responsible for the total destruction of crops, if there are any, by his own stock or outside stock that ranges in, and he is liable for full damage.

I do not think there is any real dispute in the evidence that the fences were torn down so repeatedly that the plaintiff was conducting himself reasonably by walking off and leaving them, providing he knew that this fence was torn down and due to the defendant and not to strangers. The plaintiff has tended to show the destruction of fences was by the defendant and his teamsters and others bringing supplies to the defendant, and the defendant—it is fair to say—has not submitted very much evidence to the contrary. If there is, you will bear it in mind and determine where the truth lies in respect to it. The Court will not go into the figures in respect to fences, crops, pasture and land; you have heard them and they have been gone over by both

counsel, and they are just as well in your mind as they would be in the Court's. It is for you to determine, if you find the defendant is responsible for the destroyed fencing, it is for you to determine from the evidence how much it will cost to restore those fences to the same condition that they were before the defendant injured them. If you find that the defendant is responsible for the destruction of crops and pasturage, then, from all the evidence, looking both to the plaintiff's [122—92] and the defendant's you are to determine what was the value of those crops, what it would have cost to produce them, what the pasturage was worth in that market at that time and at that place, and give to the plaintiff the net value thereof. Of course, in so far as crops were not raised, there is some conjecture always whether the crop would have come up to former estimations in earlier years or whether nature might have been so unkind that there would have been no crop at all. In respect to that there is evidence that the years were normal, the same in 1920, 1921 and 1922, that they had been so before when the plaintiff gave you the figures of the crops that he grew; he assumes to give you the figures of his blue-joint hay in 1920 and to some extent to the alfalfa also. Wherever there is a conflict or dispute in the evidence it is for you to determine. Wherever inferences are to be drawn from circumstances, it is a matter for the determination of the jury.

Now, gentlemen of the jury, I think the Court has given you as much law as is necessary in this case,

mainly the rules of damages, if you find the various items of damages are due to the plaintiff. The Court has instructed you that the plaintiff is entitled to the verdict and you will render it as such, and then it is for you to determine the amount, what is reasonable and what is fair and what will compensate the plaintiff and what is just, no more than plaintiff is entitled to and no less, for the defendant, to the extent that it is responsible, must pay all that the plaintiff has suffered. Wherever there is difficulty in proof, since the defendant is at fault, why, if the allowance weigh a little more heavily upon it than can be clearly seen, it is to blame and cannot complain because it is the one that is the cause of the situation and created the difficulties to supply the evidence to make the proof. The plaintiff is entitled to all that he has been damaged. [123—93]

When you retire to the jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon a verdict.

Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court of its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from other trespassers, and the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the [124—94] question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or possibly upon it, for the reason that there is confusion

upon the issue and not sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case.

The COURT.—Gentlemen, you will be given all the exhibits. Well, gentlemen, you have all the exhibits. You don't need the pleadings and you don't need the lease. You will be given all the exhibits and form of verdict and you will determine the matter. [125—95]

That on the 21st day of June, 1923, an order was made by the Judge of the above-entitled Court extending the time within which the defendant the Franz Corporation should serve upon the plaintiff a draft of its proposed bill of exceptions in said action to and including the 30th day of July, 1923, and now within the time specified by said order the defendant The Franz Corporation presents this its proposed draft of the bill of exceptions herein and asks that the same be signed, settled and allowed

by the above-entitled court as a true bill of exceptions herein.

C. J. MARSHALL,
STEWART & BROWN,
Attorneys for Defendant, The Franz Corporation.

Service of the foregoing draft of the defendant's proposed bill of exceptions and receipt of copy thereof acknowledged this 30th day of July, 1923.

FORD & CHOATE,
Attorneys for Plaintiff.

It is hereby stipulated and agreed that the foregoing is a full, true and correct bill of exceptions herein and the plaintiff hereby waives the right granted by the rules of the Court herein to propose amendments to the foregoing draft of the bill of exceptions herein.

FORD & CHOATE,
Attorneys for Plaintiff.
STEWART & BROWN,
Attys. for Def. [126—96]

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, in and for the District of Montana, and the Judge before whom the foregoing entitled action was tried do hereby certify that the foregoing bill of exceptions is a full, true and correct bill of exceptions in the above-entitled cause and the same is hereby signed, settled and allowed by me as a full, true and correct bill of exceptions herein.

Dated this 7 day of Aug., 1923.

BOURQUIN,
Judge of the United States District Court, in and
for the District of Montana.

That on the 19th day of June, 1923, the verdict
of the jury was filed herein which is in words and
figures as follows, to wit:

(Title of Court and Cause.)

Verdict.

We the jury in the above-entitled cause hereby
find the issues in favor of the plaintiff and against
the defendant and assess plaintiff's damages at the
sum of Thirty-five Hundred Dollars (\$3500.00.)

FRANK A. RICHARDS,
Foreman.

Filed Aug. 7, 1923. C. R. Garlow, Clerk. [127]

Thereafter, on August 7th, 1923, Court denied
defendant's petition for new trial, the journal
record thereof being as follows, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 1031.

E. J. FIFER

vs.

THE FRANZ CORPORATION.

Order Denying Defendant's Petition for New Trial.

This cause came on regularly for hearing this day on defendant's motion for a new trial and settlement of the bill of exceptions, S. C. Ford, Esq., appearing for the plaintiff and John G. Brown, Esq., appearing for the defendant.

Thereupon the bill of exceptions was agreed upon by counsel, and settled and allowed by the Court.

Thereupon the motion for new trial was argued by counsel and submitted to the Court, and, after due consideration, the Court ordered that said motion for new trial be and is denied.

Entered in open court August 7th, 1923.

C. R. GARLOW,
Clerk. [128]

Thereafter on August 10, 1923, petition for writ of error was filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the
District of Montana.

Case No. 1031.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Petition for Writ of Error.

Comes now the Frantz Corporation, the defendant above named, and shows:

That under date of June 24, 1923, there was entered in the above-entitled and styled Court and cause a judgment in favor of the plaintiff, E. F. Fifer, and against defendant, The Frantz Corporation, the said judgment being in the amount of Thirty-five Hundred Dollars (\$3,500.00), with costs; in which said judgment and the proceedings had prior thereto in this cause certain manifest errors were committed to the grievous prejudice of this defendant, all of which will appear more in detail from the assignment of errors filed with this petition.

WHEREFORE, defendant feeling aggrieved by said judgment petitions and prays this Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of errors so complained of; that an order be made fixing the amount of supersedeas bond in this case; and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the defendant herewith submits his assignment of [129] errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this honorable Court.

And your petitioner will ever pray.

C. J. MARSHALL, STEWART & BROWN,
Attorneys for Defendant.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [130]

Thereafter on August 10, 1923, assignment of errors was filed herein, being in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Assignment of Errors.

Defendant above named, plaintiff in error, in connection with his petition for writ of error herein, specifies the following particulars wherein error was committed in this case:

I.

That upon the trial of said cause the verdict of the jury rendered therein is excessive and appears to have been given under the influence of passion and prejudice.

II.

That the evidence is insufficient to justify the verdict rendered and judgment entered thereon, or

any verdict or judgment herein, among others in the following particulars:

a. It appears from the evidence submitted in the case that the defendant's right of entry upon said premises was under written contract, or agreement, and that all of the damages claimed by the plaintiff, and to which evidence was offered was due to and approximately caused by causes that were expressly relieved and excused from by the agreement of the parties.

b. From all of the evidence introduced upon the trial of this case it appears that the injuries, if any, that the plaintiff sustained to his land and premises were due to and approximately caused by causes, some of which were from defendant's action, some of which were by the action of others, [131] and most of which were by action on the part of the defendant, damages for which had been expressly waived by the plaintiff by the lease agreement existing between the parties. From the evidence it cannot be ascertained whether or not the damage was due to causes for which the defendant might be responsible, or causes for which he would not be responsible, and there is such a confusion in evidence that it would seem insufficient or lack of proof on the part of the plaintiff and failure to prove his case as laid.

c. The evidence is wholly insufficient to sustain a verdict in the amount awarded by the jury, in that there is no proof to justify such a sum in damages.

III.

Errors at law occurring at the trial, which said errors at law are as follows:

a. The Court erred in permitting testimony to be introduced with a view to showing damages as to the structures, to wit, pumping plant, pipe-lines, water-lines, and telephone lines upon the premises, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

b. The Court erred in permitting testimony to be introduced relative to roads built upon said premises, or used thereon upon the ground and for the reason that the building and use of roads upon said premises was authorized by the lease agreement between the parties and a necessary incident thereto, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

c. The Court erred in refusing to strike out the witness' answer to the following question:

“Q. What was the value of your entire tract of land prior to the entry by the Frantz Corporation? [132]

“A. I have been offered seventy-five dollars an acre for it all the way through.” (Tr., page 15.)

d. The Court erred in permitting testimony relative to the damages by loss of crop of sweet clover, to which evidence timely objections were made by the defendant, and by the Court overruled, defendant preserving its objections by exception.

e. The Court erred in permitting witness, Al. Dixon, to answer the following question:

“Q. What, in your judgment, is the value of the land since those instrumentalities have been placed upon the property?” (Tr., 27.)

f. The Court erred in refusing to allow the witness, Lantz, to testify as to what road was first used when the oil development first started, and in sustaining the plaintiff's objection to that testimony. (Tr., 55.)

g. The Court erred in sustaining the plaintiff's objection to the following question asked of witness Lantz:

“Q. Now, this hauling in, was that done by contract on a per pound basis, or did you do the hauling yourself?” (Tr., 55.)

h. The Court erred in permitting the following question to be answered by the witness Sonntag:

“Q. What was the cost of that pumping station?” (Tr., 65, 66.)

i. The Court erred in permitting the following question to be answered by the witness Sonntag:

“Q. How many wells have been drilled across the river by the Frantz Corporation where the road through the Fifer tract was used in the hauling of material?” (Tr., 66.)

j. The Court erred in sustaining plaintiff's objection to the following question asked the witness Sontagg:

“Q. Have you had occasion to rent the surface-right privileges for use similar to what you

have here under substantially similar conditions as are in existence on the Fifer tract?" [133] and in sustaining plaintiff's objection to the following question asked the same witness:

"Q. From your experience, operating under conditions similar to those on the Fifer tract, what would you say was a fair rental value for the use of the Fifer tract for the use you have put it to?"

and the Court erred in sustaining the plaintiff's objection to the defendant's written offer of proof which is in words and figures as follows, to wit:

"We offer to prove by the witness on the stand, L. F. Sontag, that he is experienced in the renting of similar lands to the Fifer lands for surface use purposes such as the Frantz Corporation is making of the lands here in controversy, and that a reasonable rental value of such lands for the purposes such as the Frantz Corporation is making of these lands is One Hundred Dollars per year.

"Mr. FORD.—To which plaintiff objects on the ground that the witness has not shown himself qualified, and from his testimony it appears that his experience in the renting of land was not had in or near the land in controversy, but, on the contrary, was had in adjoining states; and for the further reason that the rental value of said land for oil and gas mining purposes is not a material issue in this case.

"The COURT.—The offer is denied and exception may be noted." (Tr., 69, 70.)

k. The Court erred in sustaining plaintiff's objection to the question asked of the witness Hilger relative to the value of the alfalfa hay in Fergus County, Montana, during the years 1920, 1921 and 1922. (Tr., 76, 77.)

l. The Court erred in sustaining plaintiff's objection to the following question asked of the witness Downing:

“Q. From your knowledge and from the number of visits you have made there, are these assumptions real or mythical, as given you by Mr. Ford?” (Tr., 82.)

IV.

The Court erred in refusing defendant's motion for directed verdict.

V.

The Court erred in its instructions to the jury in such portions of the instructions as exception was taken to by the defendant, [134] which objections and exceptions are as follows:

Are there any exceptions for the plaintiff?

Mr. FORD.—No exceptions.

The COURT.—Any for the defendant?

Mr. BROWN.—Defendant excepts to that portion of the Court's instruction which leaves out the oil lines as one of the permanent structures.

We except to that portion of the instruction which says they are liable for the destruction of crops, no matter whether necessary for the taking of oil from these lands or not, for if the taking was necessary it would be out of the lease.

We except to that portion of the instruction which says that they are not justified in using this land in connection with the development of any other, for the reason that the evidence shows that there might be, in case of operation and to facilitate development, conditions, under which this would inure to the land in question.

We object to the consideration by the Court in its instructions of the damage to the fences *in toto* as coming from the acts of this defendant, and its instruction, for the reason that the evidence shows that there may have been damage to fences from other outside or independent operators, and the jury are entitled to consider whether or not this was from this defendant or was from trespassers, and except to the Court's instruction to fix responsibility entirely upon the defendant and no other.

The COURT.—Let me interrupt you right there; that is grossly wrong. The Court told the jury that if they can point out to any destruction by others, this defendant is not liable for it, the defendant is only liable for the destruction of the fence so far as he destroyed it.

Mr. BROWN.—I did not mean to misquote. What I mean is the question of confusion as to who caused it.

The COURT.—Yes, proceed.

Mr. BROWN.—And the defendant excepts to that portion of the instruction which allows the jury to consider the question of the destruction of the fences being entirely upon this defendant, or

possibly upon it, for the reason that there is confusion upon the issue and no sufficient proof on which the cause should be submitted to the jury.

The defendant excepts to that portion of the instruction that gives as a measure of damages to land the value of the land before and the value of the land after, and also gives a measure of damages for fences and for loss of crops, in that there cannot be three rules of damages, to wit, a general loss and destruction of the land and also a general loss and destruction of its appurtenances; that there can be but one rule, and that must be either the value of the things destroyed or lessened value in the property itself, and the instruction as given is not a correct rule of damages as applied in this case. [135]

VI.

The Court erred in denying the defendant's petition for new trial.

WHEREFORE the defendant prays that his petition for writ of error be granted and that for the reasons aforesaid and for divers and sundry other reasons the judgment entered herein as of June 24, 1923, shall be reversed.

C. J. MARSHALL,
STEWART AND BROWN,
Attorneys for Defendant, now Plaintiff in Error.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [136]

Thereafter, on August 10, 1923, order allowing writ of error was signed and filed herein, which is in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Order Allowing Writ of Error.

At a stated term, to wit, the April term for the year 1923 of the United States District Court for the District of Montana, on August 10, 1923, came the defendant herein by its attorneys, C. J. Marshall and Stewart and Brown, and filed and presented its petition praying for the allowance of a writ of error to be by it prosecuted for a review in the United States Circuit Court of Appeals for the Ninth Circuit of the judgment heretofore entered in this cause in favor of the plaintiff, E. F. Fifer, and against the defendant, The Frantz Corporation, under date of June 24, 1923; and at the same time prayed for an order fixing the amount of supersedeas bond herein and directing the transmission of the records, papers, exhibits and proceedings herein, properly authenticated, to said Circuit Court of Appeals.

On consideration of said petition and of said assignment of errors the Court does hereby allow the

writ of error prayed for and does fix the amount of the supersedeas bond in the sum of Five Thousand Dollars (\$5,000.00), which bond when given and approved shall operate as a supersedeas.

It is further ordered that the clerk of this Court prepare, properly authenticated, and transmit to the Circuit Court of Appeals for the Ninth District aforesaid a record of the proceedings [137] had and done herein, including all papers and evidence offered.

BOURQUIN,

Judge of the District Court of the United States
in and for the District of Montana.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [138]

Thereafter, on Aug. 10, 1923, bond on writ of error was approved, and filed herein, which is in the words and figures as follows, to wit:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Supersedeas Bond On Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That the Frantz Corporation, as principal, and the National Surety Company, a surety company duly

authorized to act as surety upon bonds in the State of Montana and in the courts of the United States, including those in the Ninth Circuit, are held and firmly bound unto E. F. Fifer, plaintiff above named, in the full and just sum of Five Thousand Dollars (\$5,000.00), to be paid to E. F. Fifer, plaintiff as aforesaid, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors in interest and assigns jointly and severally by these presents.

Dated at Helena, Montana, this 10th day of August, 1923.

The condition of this obligation is such that whereas, lately, at a District Court of the United States for the District of Montana, in a suit pending in said court between the said plaintiff, E. F. Fifer, and the said defendant, The Frantz Corporation, a judgment was rendered in favor of the plaintiff and against the defendant under date of June 24, 1923, and said defendant having thereafter obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse and set aside said judgment aforesaid, and a citation directed to said E. F. Fifer, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, on the 9th day of [139] Sept. 1923 next;

NOW, THEREFORE, if said defendant shall prosecute said writ of error to effect, and answer all

damages and costs if he fails to make his plea good, then this obligation shall be void; otherwise to remain and be in full force and virtue.

THE FRANTZ CORPORATION.

By John T. Brown,
Its Attorney Hereto Duly Authorized.
NATIONAL SURETY COMPANY.

By John T. Brown,
Resident Vice-President.

Attest: [Seal]

WM. E. ASHTON,
Assistant Secretary.

Approved:

BOURQUIN, J.

Filed Aug. 10, 1923. C. R. Garlow, Clerk. [140]

Thereafter, on August 10, 1923, a citation was duly issued herein, which original citation is hereto annexed, and is in the words and figures as follows, to wit: [141]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Citation on Writ of Error.

United States of America,

District of Montana,—ss.

The President of the United States to E. F. Fifer,

GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 9th day of September, 1923 next, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein The Frantz Corporation, defendant in said District Court, is plaintiff in error, and you, the said E. F. Fifer, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Given under my hand at Helena, Montana, on this 10th day of August, 1923.

BOURQUIN,

United States District Judge for the District of Montana.

Due personal service of the foregoing citation made and admitted and receipt of copy thereof together with copy of the petition for writ of error,

assignments of error and order allowing writ of error acknowledged this 10th day of August, 1923.

FORD & CHOATE,

Attorneys for Plaintiff in Said District Court and
Defendant in Error Herein. [142]

[Endorsed]: #1031. In the District Court of the United States for the District of Montana. E. F. Fifer, Plaintiff, vs. The Frantz Corporation, Defendant. Citation on Writ of Error. Filed Aug. 10, 1923. C. R. Garlow, Clerk. [143]

Thereafter, on August 10, 1923, writ of error was duly issued herein, which original writ of error is hereto annexed, and is in the words and figures following, to wit: [144]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honorable, the District Court of the United States for the District of Montana, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is

in said District Court before you or some of you, between E. F. Fifer, as plaintiff, and The Frantz Corporation, as defendant, a manifest error hath happened, to the great damage of said defendant, as by its petition and assignment of errors appears, we, being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, in said Circuit, on the 9th day of September, 1923, next, within thirty days hereof, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [145] to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of the United States for the District of Montana, this 10th day of August, 1923, and in the one hundred and forty-eighth year of the Independence of the United States of America.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States for
the District of Montana.

Service of the foregoing writ of error is hereby admitted this 10th day of August, 1923.

FORD & CHOATE,
Attorneys for Plaintiff. [146]

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Answer of Court to Writ of Error.

The answer of the Honorable, the United States District Judge for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to which this writ is annexed, as within it I am commanded.

By the Court.

[Seal]

C. R. GARLOW,

Clerk. [147]

[Endorsed]: #1031. In the District Court of the United States for the District of Montana.

E. F. Fifer, Plaintiff, vs. The Frantz Corporation,
Defendant. Writ of Error. Filed Aug. 11, 1923.
C. R. Garlow, Clerk. [148]

Thereafter, on August 11, 1923, praecipe for transcript on writ of error was filed herein as follows:

In the District Court of the United States for the
District of Montana.

E. F. FIFER,

Plaintiff,

vs.

THE FRANTZ CORPORATION,

Defendant.

Praecipe for Transcript of Record.

To C. R. Garlow, Esq., Clerk of the United States
District Court Above Named:

Dear Sir:

You will kindly prepare and certify to a transcript of record on appeal from the judgment rendered and entered in the above-entitled cause, under date of June 24th, 1923, the papers required therefor being the following:

1. Complaint of plaintiff.
2. Summons with return of service.
3. Answer of defendant.
4. Reply of plaintiff.
5. Verdict of jury.
6. Judgment.

7. Petition for new trial.
8. Bill of exceptions.
9. Exhibits introduced in evidence in said case.
10. Opinion and order of Court denying motion for new trial.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error and fixing amount of supersedeas bond. [149]
14. Writ of error.
15. Citation on writ of error.
16. Supersedeas and cost bond.
17. Answer to writ of error.

Dated this 11th day of August, 1923.

C. J. MARSHALL,
STEWART and BROWN,
Attorneys for Defendant and Plaintiff in Error.

Filed Aug. 11, 1923. C. R. Garlow, Clerk. [150]

**Certificate of Clerk United States District Court
to Transcript of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 150 pages, numbered consecutively from 1 to 150, in-

clusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and of the whole thereof, required to be incorporated in said transcript of record by the praecipe of the plaintiff in error, as appears from the original files and records of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that there is transmitted with this transcript, by order of the court, all original exhibits introduced at the trial of said cause, to wit: Plaintiff's Exhibits Nos. 1 and 2 and Defendant's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

I further certify that the costs of the transcript of record amount to the sum of Sixty-three and 50/100 Dollars (\$63.50), and have been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 28th day of August, A. D. 1923.

[Seal]

C. R. GARLOW,

Clerk. [151]

[Endorsed]: No. 4090. United States Circuit Court of Appeals for the Ninth Circuit. The Franz Corporation, a Corporation, Plaintiff in Error, vs. E. J. Fifer, Defendant in Error. Transcript of

Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 31, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.